IN THE SUPREME COURT OF FLORIDA

CASE NO. 84,702

PABLO SAN MARTIN,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

AN APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA
CRIMINAL DIVISION

BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF CITATIONS

CASES PAGE

CASES PAGE

CASES PAGE

CASES PAGE

CASES PAGE

OTHER AUTHORITIES PAGE

POINTS ON APPEAL
(Restated)

I.

THE TRIAL COURT PROPERLY REFUSED TO SEVER DEFENDANT'S TRIAL FROM THAT OF CODEFENDANTS FRANQUI AND GONZALEZ.

II.

THE TRIAL COURT PROPERLY REFUSED TO SUPPRESS DEFENDANT'S CONFESSION.

III.

DEFENDANT'S JURY WAS NOT IMPROPERLY "DEATH-QUALIFIED," NOR WAS HE ENTITLED TO INDIVIDUAL SEQUESTERED VOIR DIRE ON THE ISSUE OF THE DEATH PENALTY.

IV.

DEFENDANT WAS NOT ENTITLED TO A VERDICT FORM WHICH SPECIFIED WHETHER HE WAS GUILTY OF FELONY OR PREMEDITATED MURDER.

V.

THE STATE PRESENTED EVIDENCE SUFFICIENT TO SUPPORT DEFENDANT'S CONVICTION OF FIRST DEGREE MURDER.

VI.

DEFENDANT'S CLAIMS REGARDING THE MURDER VICTIM'S FINAL WORDS ARE WITHOUT MERIT.

VII.

DEFENDANT HAS FAILED TO DEMONSTRATE THAT ANY DOCUMENTARY EVIDENCE REGARDING HIS CODEFENDANTS WAS IMPROPERLY ADMITTED AGAINST HIM.

VIII.

THE STATE'S PRESENTATION OF DR. MUTTER'S TESTIMONY TO THE COURT WAS NOT IMPROPER.

IX.

DEFENDANT WAS NOT DENIED HIS REQUEST FOR EXPERT ASSISTANCE.

X.

THE TRIAL COURT PROPERLY OVERRODE THE JURY'S RECOMMENDATION WHERE THERE WAS NO REASONABLE BASIS UPON WHICH TO IMPOSE A LIFE SENTENCE IN VIEW OF THE AGGRAVATING AND MITIGATING CIRCUMSTANCES PROVED AT TRIAL.

XI.

FLORIDA'S DEATH PENALTY STATUTE IS CONSTITUTIONAL.

XII.

DEFENDANT WAS PROPERLY SENTENCED TO DEATH WHERE THE TRIAL COURT CORRECTLY DETERMINED THAT DEFENDANT INTENDED LETHAL FORCE TO BE EMPLOYED, WAS A MAJOR PARTICIPANT IN THE ROBBERY AND HIS MENTAL STATE WAS, AT THE VERY LEAST, ONE OF RECKLESS INDIFFERENCE FOR HUMAN LIFE.

STATEMENT OF THE CASE AND FACTS

A. INTRODUCTION

Defendant was charged, along with codefendants Leonardo Franqui, Fernando Fernandez, Ricardo Gonzalez, and Pablo Abreu, in an indictment filed on February 4, 1992, in the Eleventh Judicial Circuit in and for Dade County, Florida, case number 92-2 14 1 (C), with: (1) the premeditated or felony murder with a firearm of Steven Bauer, a law enforcement officer acting in the course of his duties; (2) the armed robbery with a firearm of the Kislak Bank and Michelle Chin; (3) the aggravated assault with a firearm of Michelle Chin; (4) the aggravated assault with a firearm of LaSonya Hadley; (5) the unlawful possession of a firearm during the commission of a felony; (6) the grand theft of the motor vehicle of Rafael Armengol; (7) the burglary of the motor vehicle of Rafael Armengol; (8) the grand theft of the motor vehicle of Elias Cantero; and (9) the burglary of the motor vehicle of Elias Cantero. Counts (3) and (5) were nolle prossed before trial. (R. 1-5).

Abreu pled guilty prior to trial, and Defendant moved to sever his trial from that of the remaining codefendants based upon their allegedly inconsistent statements given to the police. (R. 163- 164). The motion was granted as to codefendant Fernandez, (R. 159), and the court ruled that the case would be tried jointly with two juries, (A) for Fernandez and (B) for the remaining defendants. As to the confessions of Franqui and Gonzalez, the court held they were admissible against Defendant and each other:

> Unlike FERNANDEZ' confession, the confessions of the

remaining defendants are indistinguishable as concerns the material issues in the case. Indeed the confessions of the defendants FRANQUI and SAN MARTIN are virtually identical in every way. FRANQUI and SAN MARTIN told police that the idea of robbing the Kislak Bank was originated by a black male they met through FERNANDEZ; that they met with the black male and FERNANDEZ approximately one week before the day of the robbery; that they planned to steal two cars; that the cars were stolen by breaking the windows, removing the ignition switch and starting the car with a wrench; that they went to the bank the day before (SAN MARTIN says they went the day before then corrects himself and says they went the week before); that on the day they went to check the bank they observed a tall man wearing a shirt and tie exit the bank in the company of two tellers; that on the day of the robbery they met at SAN MARTIN's house at approximately 7;O0 [sic] am; that they drove to where the stolen cars had been parked in FRANQUI's Buick Regal; that FRANQUI and SAN MARTIN drove the stolen cars (both Chevrolet Caprices) and the other three men rode in FRANQUI's Buick Regal; that they met at a location approximately two blocks away from the bank; that codefendant PABLO ABREU remained in the Buick Regal at that location; that they drove to the bank and parked in front of the drive through but could not pull into same because chains were blocking the way; that they saw a security guard exit the bank with two females they presumed to be the cashiers; that FRANQUI and GONZALEZ exited the car and approached the security guard; that upon seeing FRANQUI and GONZALEZ the security guard reached for his gun; that shots were exchanged between FRANQUI and GONZALEZ and the security guard; that they all got back to their cars and left the bank; that they returned to where the Buick Regal was waiting with PABLO ABREU at the wheel; that they abandoned the stolen Chevrolets at that location; that they fled the scene and went to the home of PABLO ABREU where they split the money they had just stolen.

Although there are small details which both defendants did not relate in exactly the same way, the overwhelming bulk of the statements are identical.

The confession of GONZALEZ although not as rich in detail as those of FRANQUI and SAN MARTIN is also

indistinguishable from those of his codefendants as concerns the material aspects of the case. GONZALEZ told the police that some time before the robbery FRANQUI and SAN MARTIN went to his house to "feel him out" about money. Some time after that they again met and GONZALEZ was told that "something was going down" but he was not told exactly what. Ultimately GONZALEZ was told that the job involved a robbery at the drive through of a bank and that a security guard and two women would be involved. He was additionally told that two boxes of cash would be involved and that the robbery would be done on Thursday or Friday. On the day of the robbery GONZALEZ was picked up by FRANQUI. They in turn went to pick up SAN MARTIN and from there proceeded to the location where the stolen cars had been parked. GONZALEZ describes the stolen cars as long, four door, gray and blue cars. He knew they were stolen because FRANQUI had previously told him that two cars would be stolen for the robbery. They drove to the two stolen cars in FRANQUI's Buick Regal. When they arrived at the stolen cars GONZALEZ met two men, one he did not know and the other he knew was related to SAN MARTIN, i.e. PABLO ABREU. They all left in FRANQUI's Regal and the two stolen cars. At some time thereafter FRANQUI designated who would go to the bank and told ABREU that he would stay in the Regal "on the corner." Once they got to the bank in the two stolen cars they parked in front of the drive through. FRANQUI handed GONZALEZ a gun. They observed the two women come out of the bank carrying boxes. FRANQUI exited the car and headed straight for the security officer with GONZALEZ following approximately five feet behind. FRANQUI said "don't move" and the officer reached for his gun. FRANQUI then shot the guard and so did GONZALEZ. GONZALEZ told police that he saw the officer fall to the ground and then observed the defendant SAN MARTIN take the box one of the two women was carrying. GONZALEZ then returned to his car with FRANQUI and SAN MARTIN returned to his car. Both cars then fled the area. They returned to where the regal was parked with ABREU at the wheel. There they left the stolen cars and drove away in the Regal. They returned to ABREU's house and there divided the money.

As stated above, although GONZALEZ's confession is not quite as rich in detail as FRANQUI and SAN MARTIN's it is, as

concerns all material details, indistinguishable.

> The court first finds that the defendants herein are "unavailable" as contemplated by the United States Supreme Court in lee (supra).
>
> The court further finds that the confessions of the defendants FRANQUI, SAN MARTIN and GONZALEZ contain indicia of reliability necessary to allow their introduction during a joint trial as direct evidence against each of the three defendants. Their motions for severance are accordingly DENIED. The motion for severance filed by the defendant FERNANDEZ is GRANTED.
>
> The court rejects the State's suggested redactions of the defendant FRANQUI's and GONZALEZ's confessions except for those sections that make reference to the defendants' prior criminal activity. The court rejects these redactions because the facts set forth therein are immaterial. The majority of the redactions concern the issues of who secured the guns used in the robbery, who, as between FRANQUI and GONZALEZ, fired the first shot and who, as between FRANQUI and GONZALEZ, said "don't move" to the victims in the case. In view of the fact that both defendants admitted participating in the robbery and shooting the homicide victim, these details are totally insignificant and do not in any way detract from the indicia of reliability which makes the introduction of these confessions at a joint trial possible.

(R. 156-60). Defendant also filed a motion to suppress his statements to the police, (R. 165-66), which was denied. (R. 301-322).

B. GUILT PHASE

The trial of Defendant commenced on May 26, 1994. (T. 868). Those portions of the voir dire relevant to the issues herein will be discussed in the body of the argument. (T. 254-835).

Dorrett Ellis banked at the Kislak National Bank off 135th Street in North Miami. On the morning of January 3, 1992, she went to the bank to make a deposit. (T. 892) She was in her car in the drive through lane around 7:55. The bank was not yet open and she waited in her car. There was a car in front of her with two men in it. There was also a car on the left side with two men in it. The car ahead was bluish gray with four doors. (T. 893) Ellis did not get a Full view of the men, but they looked latin. (T. 894).

The officer walked out the door of the bank building with the tellers. He was wearing a police uniform. The two men jumped out of the cars, and ran in front of the cars, firing a gun. (T. 894). They jumped out of the car and fired simultaneously. Ellis heard three or four shots. Then the officer went down. The men ran toward the officer and then they ran back to the car and drove off in a southerly direction. Ellis backed up her car and headed west on 7th Avenue, then returned to the bank, left again and then went to work. She was driving a red Cougar. (T. 895-96).

Elijah Battle was a medical lab technician employed by HRS who took the bus to work that traveled northbound on 7th Avenue in front of the bank. (T. 907). On the date in question, he was seated on the left side of the bus when it stopped in front of the bank. He heard three gunshots. He looked out the window to the west and saw a light-colored Chevrolet come screeching out of the bank. Battle saw the driver in the car, a young latin. He could not see the passenger side of the car from up in the bus. The car turned southbound, and then turned right, to the west. (T. 908- 12). Battle also saw a red Cougar

come out right after the Chevy, and then come back. (T. 9 14).

Several days later, Elijah Battle was recalled and testified that prior to trial he was never shown any photos. After testifying, he had informed the prosecutor that he had seen the driver of the Caprice in court; he did not say anything at that time because no one asked him. Battle then identified Franqui as the driver. (T. 1853). In court was the first time he had seen Franqui since the murder. (T. 1854).

In January of 1992, LaSonya Hadley was a drive-through teller at the Kislak National Bank branch at 134th Street and 7th Avenue. She arrived at work each morning at 7:45. When her coworker Michelle arrived, they would get the money from the vault and go to the outside booths. (T. 93 1-32). The money was kept in a cash drawer. It would have had $15,000-20,000 in it, never more than $20,000. They would wait for the police officer to come and take them outside. (T. 933). The police officer always dressed in a North Miaml Police Department uniform. The officer had patches on his shirt and carried a gun on a belt holster. The officer would look out the small window on the door to check if it was safe and then they would go. (T. 934). The officer would walk them to the drive through booth and make sure the door was locked. (T. 935). He would give them a few minutes to set up, then move the chains to let the cars in. (T. 936).

On January 3, 1992, the weather was sunny. Michelle was her coworker that day. (T. 937). Michelle arrived around 7:50 a.m. They went to the vault and got their cash

trays, and then told Officer Bauer they were ready to go. Bauer went to the door to check on the parking lot. (T. 938). Then he unlocked the door. Hadley went first, then Michelle, then Bauer. As Hadley was putting the key into the lock to the drive-through booth, she heard people getting out of a car. There were two men coming toward her from the cars. When they drew closer, she saw their guns. (T. 939). Each one had a gun. Bauer was trying to get his gun out. Hadley dived for the booth. She went for the alarm, and lay there waiting, because she still had her money in her hand. (T. 940).

Then Hadley heard three or four shots. She heard Bauer cry out. He said he was shot. She got up and went back outside. (T. 940). He asked her if she was all right. Hadley asked Bauer if he was all right, and he said not to worry because he was only shot in the leg. She realized that there was too much blood; that it had to be more than that. She was kneeling inside the drive through area. She had him resting in her lap from the waist up. He bled all over her. (T. 94 1). Then Michelle came over and the branch manager arrived, and they waited for the police to come. After a few minutes, Bauer stopped responding to questions. Then the police arrived and took over. (T. 942).

Michelle Chin Watson worked as a drive through teller for Kislak National Bank in January, 1992. (T. 947). She worked with LaSonya Hadley. She detailed the same morning procedures as Hadley. (T. 948-49).

On the date in question Steven Bauer was the officer who escorted them. He had a

uniform with patches and a gun on his belt. Bauer opened the back door as usual. (T. 949) They went outside, Hadley first, then Watson, then Bauer, who closed the door. Then they were walking forward and she heard a yell from some men in the drive through. (T. 950). She continued to walk toward the drive through. She kept walking until she heard shots. Then she got down on the floor. She squatted down with her head toward the floor and set the cash drawer down in front of her. (T. 95 1). Then someone came and took the cash drawer from her. She only saw the person's hands and feet. She stayed where she was until she heard the car drive away. Then she turned to where Bauer was. (T. 952). She walked over to him and heard him say "Oh, God." He also asked if they were okay. He talked about where he had been shot and tried to get them not to worry about him. (T. 953).

Bauer's 9mm Sig-Sauer semi-automatic service weapon was recovered at the scene. (T. 1030). The weapon had 15 rounds in it, which was its capacity; it had not been fired. (T. 1032, 1042). Also recovered at the scene were Bauer's service-issue gunbelt, watch, knife, handcuffs, hand-held radio. (T. 1033-39). There were projectile holes through both the uniform shirt and the t-shirt that Bauer had worn, just below the collar. (T. 1054, 1057).

The two vehicles used in the robbery were located shortly after, two blocks west of the bank on 10th Avenue between 134th and 135th Streets. (T. 974). The vehicles were both gray Chevrolet Caprices. Both engines were running, but neither had keys in the ignition. One had a right rear vent window broken; the other had the left rear. The were parked on

either side of 10th Avenue, facing opposite directions. There were no people present. (T. 975-76). There is an alley which runs from the bank parking lot up to and past 10th Avenue. (T. 977).

North Miami Police Detective Donald Diecidue met codefendant Gonzalez at Metro Police HQ around 11 a.m. on January 18, 1992, and placed him under arrest for the robbery of the Kislak National Bank and the murder of Officer Bauer, and then read him his *Miranda* rights. (T. 1376-83). Gonzalez then gave a statement regarding the crimes. He met Franqui around Christmas 199 1, who advised him they were doing a "job" and asked him if he wished to join. The job involved a robbery of a bank drive-through, two female tellers with cash boxes with a lot of money. Defendant said it would be easy, but there was security. (T. 1390). Gonzalez said that Defendant said it would be on a Thursday or Friday. It ended up being the latter. Franqui said the plan was to steal two cars. Franqui and Gonzalez would be in one car and two others would be in the other car. Gonzalez identified a photo of Defendant. (T. 1392-93).

On January 3, *1992* Franqui picked up Gonzalez and they met with Defendant. (T. 1393). Then they drove to where the Chevys were to meet the other two people. Then they went and parked near the bank. Franqui drove the car in which Gonzalez rode. (T. 1394). Gonzalez had a .38 and Franqui had a 9mm. When the tellers and the officer exited the bank, Franqui jumped out of the car, and so did Gonzalez. Defendant ran within 12 feet of the

officer and told him not to move, in Spanish. (T. 1395). The officer went for his gun and Franqui fired. Gonzalez said he fired also. Gonzalez was supposed to run up and get the cash boxes, but Defendant got there first, grabbed the box and ran back to the car. (T. 1396). Gonzalez then agreed to give a recorded statement, which was played for the jury. (T. 1397-1440).

After obtaining consent from Gonzalez, Detective Spotts and Special Agent Lee searched the bedroom of Gonzalez's house. (T. 15 18-22). Spotts found money wrapped in tissue paper and taped up in a gym bag in the top of the closet. (T. 1523). There was approximately $1200 in twenty-dollar bills. (T. 1526). Spotts subsequently re-mirandized Gonzalez and reinterviewed him. (T. 1527-32). Gonzalez said they had divided the money at Abreu's apartment and he got $1500, in tens, fives and twenties. He had spent the other $300. (T. 1533-34). A tape of the interview was played for the jury. (T. 1535-46).

After they were done taping, Gonzalez recounted what had occurred the day of the murder. He explained that he and Franqui had Bauer in the crossfire and there was no place for him to go. Franqui fired his semiauto first. Gonzalez also fired his .38. Bauer just moaned after he was shot, and Defendant grabbed the money tray. Then they fled the scene, ditched the Chevys and got away in Franqui's Regal. (T. 155 1-54).

Detective Mike Santos of the Metro-Dade Police Department and FDLE Special Agent Dorothy Ingraham interviewed Defendant on January 18, 1992 after he had previously been

Mirandized. (T. 157 1). Santos told Defendant that codefendant Fernandez has said Defendant was involved in the Kislak Bank case. Defendant conceded that he was involved. (T. 158 5). Defendant stated that the planning of the robbery was from a friend of Fernandez's, a black male whom Defendant could not or would not identify. However the rest of the participants eventually cut Fernandez's friend out and carried it out without him. The persons involved were Gonzalez, Franqui, and Fernandez, and Defendant's cousin Pablo Abreu. (T. 1586). Defendant was assigned the job of snatching the money trays from the tellers. All of them had previously gone to the bank to observe the tellers' routine. (T. 158 7). The day before the robbery they stole two Chevrolets to use in the robbery. On the morning of January 3, 1992, they met at Defendant's house. (T. 1588). In addition to the two Chevys, Abreu drove Franqui's Buick. (T. 1589). The four defendants went to the bank in the two Chevys and Abreu waited a few blocks away in Franqui's Buick. When they got to the bank, Defendant crouched behind one of the drive-through pillars. Then the two women and the police officer came out. Then suddenly shots were fired at the officer. After the shooting stopped, the officer was laying in the drive-up area, apparently wounded and Defendant ran up and grabbed the money tray that was dropped by one of the tellers. (T. 1590). Then he ran and got into one of the Chevrolets. They took off and went to meet Abreu. They dumped the stolen cars and took off in the Regal. (T. 159 1). Later that day they counted the money, and there was $14- 15,000 in it. Defendant received $3,000. (T. 1592). Defendant's stenographically recorded statement was then read to the jury. (T. 1598- 1628).

On January 18, 1992, Detectives Jared Crawford and Greg Smith of the Metro-Dade Police Department interviewed Franqui. (T. 1665). After receiving his *Miranda* rights, Franqui agreed to discuss the Kislak case with them. (T. 165662). Franqui denied any involvement in the crimes, claiming he was at home with his wife Vivian. Franqui denied knowing Abreu, Fernandez and Gonzalez. (T. 1667). Smith informed Franqui that the others were in custody and naming him. At that point Franqui confessed. (T. 1668). He admitted to knowing Abreu, Defendant, Gonzalez and Fernandez. He said they were all involved in the robbery but that only he and Gonzalez were armed. Franqui said that he first became aware of the plan between Christmas and New Years, from Fernandez. (T. 1669). A black man who was a friend of Fernandez's originally came up with the plan. (T. 1670). The plan was to steal two similar vehicles. (T. 1671).

On the morning of January 3, 1992, they met at Defendant's house. (T. 1674). From there they went to the bank, first stopping to leave Franqui's Buick Regal with Abreu nearby while the other four went on to the bank in the two stolen Caprices. (T. 1695). Franqui and Gonzalez were in one, with Franqui driving; Defendant and Fernandez were in the other. Fernandez drove the second vehicle. Franqui said that he had a 9mm and Gonzalez had a .357 revolver. (T. 1676-77). Franqui's car was closest to the bank and the other was next to it. All four exited the vehicles, and both Franqui and Gonzalez pulled their guns after the tellers came out of the bank building. (T. 1678). Gonzalez yelled freeze, and then he heard a gunshot. The guard was unholstering his 9mm, but Franqui was not sure who shot

first. Franqui then fired once toward the guard and fled back to the vehicle. Then they drove to where Abreu was waiting and all five fled in the Buick. (T. 1679-80). The job of Fernandez and Defendant was to actually take the money. When they split the money up, Franqui received $2400. (T. 168 1). Both guns were left at Abreu's house and he never saw them again. (T. 1682). Franqui also claimed that the Regal was stolen but it was later learned that it in fact belonged to Franqui's girlfriend. (T. 1693).

Hialeah Police Department Albert Nabut met with Franqui later in the same day of his interview with Smith. (T. 17 12). Franqui told him that Abreu kept the guns after the crimes. (T. 17 13). Franqui also told him that Fernandez stole the Caprices. (T. 17 14). The Defendant and Abreu had told Franqui that the guns had been thrown in the water somewhere. (T. 17 16). After Nabut interviewed Franqui, Smith returned and took Franqui's stenographically recorded statement. (T. 1724). The statement was read to the jury. (T. 1727-51).

On January 2 1, 1992, Nabut met with Defendant. (T. 1754). After being given his *Miranda* rights, Defendant, after first telling him he threw them in the ocean, eventually told Nabut that he had thrown the guns into the Miami River. He told him they were near the mental hospital at 19th Avenue just off the Dolphin Expressway. (T. 1755-59). The next day Nabut went to he location indicated with divers from Metro-Dade, who found the guns. (T. 1763).

Robert Kennington, a firearms examiner with the Metro-Dade Crime Laboratory, examined a semi-jacketed hollow point projectile, "C" from a .38 revolver, and some fragments which were recovered from the scene. (T. 1868). The fragments "D" were not consistent with a revolver, but were consistent with a 9mm semiautomatic. (T. 18 7 1). The casing "M" which was recovered from the scene was also from a 9mm. (T. 1872). Kennington also received the two guns from the river. The first was a ,357 magnum, capable of firing .38 projectiles. (T. 1875). The other was a 9mm semiautomatic. (T. 187677). Kennington also examined two projectiles and some fragments which were taken from Bauer's body and submitted to him by the medical examiner's office. (T. 188 1). "A" was a .38 and "B" was a 9mm bullet. (T. 1883).

Kennington determined that the "A" bullet was fired from the .357 found in the river. The "B" bullet was fired from the 9mm found in the river. (T. 1884). Bullet "C" from the scene was also fired from the .35 7. (T. 1885). All three matches were to the exclusion of any other gun in the world. Fragments "D" were consistent with the 9mm, but were insufficient to positively exclude their having been fired by any other 9mm. (T. 1886). Casing "M" was conclusively fired by the 9mm from the river, to the exclusion of any other gun in the world. (T. 1887). "A" and "C" were separate bullets. Therefore the .357 was fired twice at the scene. Likewise, fragments "D" were not part of bullet "B" which was whole. (T. 1888). Therefore a minimum of four shots were fired at the scene. (T. 1890).

Forensic Pathologist Dr. Jay Barnhart of the Dade County Medical Examiner's Office, performed the autopsy on Bauer on January 3, 1992. (T. 1892-94). Bauer had a gunshot wound to his left thigh. There was an entrance wound and no associated exit. (T. 1897). Bullet "B" was located in Bauer's hip. (T. 1905). An additional gunshot wound entered the back of Bauer's neck and went downward through his heart and lodged where the ribs joined with the abdominal organs. This was bullet "A". (T. 1902, 07).

Wound "B" would not have been fatal, but would have been quite painful. Wound "A" was fatal standing alone. (T. 1908). The cause of death was gunshot wounds. (T. 1909). Wound "A" was not consistent with Bauer and the shooter standing and facing each other. The wounds were consistent with Bauer being first shot in the leg, and then falling either face down or back down and then being shot in the back of the neck. (T. 1930).

Crime Scene Technician Mike Melgarejo of the Metro-Dade Police Department processed the two tone charcoal over gray Chevy, tag number FIV 13C. (T. 1 102). He retrieved 15 latents from the vehicle. (T. 1 108). Crime Scene Technician Thomas Charles of the Metro-Dade Police Department processed the maroon-topped gray Chevy, tag number JMI 86J. (T. 1 128). He retrieved 12 latents from the vehicle. (T. 1 133). Metro-Dade fingerprint technician Richard Laite compared various latents with standards of the defendants. There were eight latents of value from the Caprice, tag number FIV 13C. Five were matches. Femandez's fingerprints matched those found on the outside right front door, the outside left front window, the rear edge of the driver's window frame, and the outside of the hood. There

was one match with Franqui, from the outside left front door. (T. 1834-36). There were 12 latents from the second Caprice, tag number JMI 861. Seven were of value. None matched any of the defendants. (T. 1837).

The jury returned a verdict of guilty as charged on all counts. (T. 2309-10).

C. PENALTY PHASE[1]

The penalty phase commenced on September 19, 1994. (T. 2329). Through Craig Van Nest and City of Miami Detective Boris Mantecon, it was established that Defendant had participated in an unrelated armed robbery in which Van Nest, who was driving an auto parts van, was pursued and confronted by Franqui, Defendant, and a third individual, Vasquez. Franqui had proposed "to take over a van," and he and his companions expected Van Nest's van to be carrying a lot of money. (T. 2384-85). Van Nest eluded the men, who were driving a Toyota Previa van, after they tried to get Van Nest to pull over by flashing a police badge. (T. 2363, 2385, 2389). Van Nest proceeded to his destination and left his Chevy Astro van to make a delivery. (T. 2364, 2385, 2389). As he was entering the building he

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[1] Prior to the penalty phase, the State moved to admit "victim impact" evidence pursuant to § 92 1. 14 1, Fla. Stat. (R. 127-132). The court denied the motion and found the statutory provision unconstitutional. (R. 136-145). The State sought certiorari review in the district court. The Third District denied relief but certified its decision as being in direct conflict with State *v.* Maxwell, 647 So. 2d 871 (Fla. 4th DCA *1994). State v. Fernandez,* 643 So. 2d 1094 (Fla. 3d DCA 1994). This court ultimately reversed that ruling. *State v. Fernandez, 657 So.* 2d 1 160 (Fla. 1995). However, the penalty phase below was conducted during the pendency of the appeal, and consequently no "victim impact" evidence was adduced.

turned and saw that the Previa had returned. Franqui and the other men were searching through his van and removing items. When Van Nest offered resistance, Vasquez hit Van Nest on the head with a gun. (T. 2365-67, 2385, 2389). Van Nest was then forced into the Previa. (T. 2368, 2385-86, 2389). Vasquez stole Van Nest's Astro van. During the ensuing flight, the gun, which Vasquez had given to Franqui, went off inside the Previa, which was occupied by Defendant and Franqui. (T. 2369-73, 2385, 2390). The prosecution introduced into evidence certified copies of Defendant's convictions for armed kidnapping and armed robbery in the Van Nest Case. (T. 2392-93).

Pedro Santos and Detective Nazario provided testimony as to another unrelated attempted robbery and aggravated assault which Defendant had participated in and for which he had previously been convicted. Franqui, Defendant, and a third individual were at a restaurant when they observed a security guard carrying a cash bag near the Republic National Bank, on Bird Road in unincorporated Dade County. They decided to rob the guard. (T. 2408, 2416). The three went to the bank and waited for the guard to make his appearance, while Franqui remained nearby in his Buick Regal (T. 2410, 2417). Santos, 73, was the security guard. (T. 2398). A car pulled up as he was delivering the (empty) cash bag to the drive-through. Defendant got out of the passenger side and demanded the bag. After the cash bag was demanded, Santos was threatened and shots were fired. The guard, Santos, was not hit, and held onto the bag. He reached for his own gun, and several more shots were fired at him, when the offenders fled. (T. 2400-04, 24 1 1 - 12, 2418-19). Copies of the judgments of conviction for aggravated assault and attempted robbery with a firearm were

introduced into evidence. (T. 24 19-20) .[2]

Hialeah Police Department Detective Albert Nabut and Metro-Dade Police Department Detective Mike Santos testified regarding the murder of Raul Lopez and the attempted murders and robbery of Danilo Cabanas, Sr. and Jr. (T. 2424-26, 2461-42). They described how Franqui, Defendant, and Defendant's cousin, Pablo Abreu, driving a pair of Chevrolet Suburbans, boxed in the Blazer driven by the Cabanases and the pickup driven by Lopez. The Cabanases were making their weekly run from the bank to their check-cashing business with a large quantity of cash. Lopez was along for protection. Abreu and Defendant dismounted from the forward Suburban, and began firing their guns toward the Cabanases. Franqui, who was in the second Suburban, stopped alongside the victims' vehicles, and fired at Lopez, killing him. Lopez was not able to fire hls gun before being shot. The elder Cabanas returned fire, and Defendant and his cohorts fled. The gun Franqui used to kill Lopez was the same gun which Gonzalez used to kill Bauer. (T. 2426-46, 2462-67). The prosecution introduced into evidence certified copies of Defendant's convictions for the first degree murder of Raul Lopez, the attempted first degree murder of the Cabanases (two counts), and attempted robbery with a firearm. (T. 2468).[3]

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[2] Defendant's convictions in the Van Nest and Bird Road cases were affirmed. *San Martin v. State,* 629 So. 2d 1077 (Fla. 3d DCA 1994).

[3] This conviction is currently on appeal before this *court. San Martin v. State,* case number 83,6 1 1 (opinion pending).

The defense called Jorge Herrera, a neuropsychologist who examined Defendant on August 20 & 24, 1993. Herrera took a history and administered a battery of approximately eighteen instruments. He also reviewed a report produced by clinical psychologist Dorita Marina who had examined Defendant earlier in 1983, as well as the report of psychiatrist Charles Mutter who examined Defendant in October, 1993. He also reviewed the report of Antonio Lourenco, a neuropsychiatrist to whom Herrera referred Defendant. (T. 2694-2702).

At the first meeting, Herrera obtained a history from Defendant, and conducted the initial diagnostic interview, (T. 2703). Defendant told him that he came to the United States in 6th or 7th grade. Defendant did not repeat any grades while in Cuba, which was significant because the Cuban school system does not promote socially. (T. 27 I 7). Defendant stated that he had no difficulty learning to read, although he did have difficulty reading. When he came to the U.S., he passed 7th grade, but was promoted socially to 8th and 9th. (T. 27 17). He dropped out of 9th grade at the age of 16. Herrera's impression was that Defendant was not a good student, although he did not verify this. (T. 2 7 18).

Defendant told Herrera that he had suffered three injuries while growing up which Herrera felt were important. At five years of age, he suffered an injury from a pair of scissors to one of his eyes which left him with no functional vision from that eye, meaning he could only see shadows. (T. 27 18- 19). At fifteen, he was in a bicycle accident which left a scar over his left eye. He did not lose consciousness in that accident. At seventeen, he was injured

in another biking accident and lost consciousness, although Defendant said he could not remember for how long or the nature of the injury because of the loss of consciousness. He did not receive medical treatment for the injury. (T. 2720). The injuries were important in that the vision loss could, although not necessarily, account for Defendant's complained-of headaches and difficulty reading. The biking accidents with head trauma raised the possibility of posttraumatic organic brain syndrome. (T. 272 1).

At the second meeting, Herrera administered the psychological test battery. (T. 272 1). The first group addressed Defendant's higher cerebral functions. (T. 2722). Defendant was given a non-verbal intelligence test. Herrera got a result of a 75 IQ. This was consistent with Marina's findings on the WAIS. This score placed Defendant in the borderline to mildly retarded range. (T. 2722-24). From the Wisconsin Card Sorting test, Herrera concluded that Defendant had mild brain impairment or injury. (T. 2724).

The next group of tests addressed Defendant's visual association skills. Defendant performed within the normal limits. (T. 2725, 27).

Herrera also determined that Defendant's verbal fluency was in the moderately impaired range. This would indicate problems in the frontal lobes, which also regulate impulse control. (T. 2726). In the trail-making test, Defendant did well in the number portion, but poorly in the alphabetical. Herrera believed this indicated some damage to the left frontal lobe. (T. 2728). The same conclusion was derived from the memory testing where

Defendant's visual memory was good, but his verbal memory was impaired. *Id.* The motor tests were good except for hand strength, which was very low, which was consistent with frontal lobe impairment. (T. 2729-30).

The final test was the MMPI, which was given in the interview version because of Defendant's reading problems. The test did not reveal any psychopathology. (T. 273 1).

Herrera concluded that Defendant had low intellectual functioning, difficulty in the verbal processes, and possible brain dysfunction in the left frontal area. (T. 273 1-32). As a result Herrera believed that Defendant would be very easily led, and had a lack of understanding of the ultimate consequences of his actions, and would perform poorly in an unstructured environment. Further his thinking was very concrete, and as such would not do well in stressful situations. (T. 2733-34). Herrera felt that Lourenco's findings corroborated his conclusion that there was brain dysfunction in the left temporal lobe. (T. 2735).

As a result of his findings, Herrera opined that Defendant did not really understand the consequences of his behavior. He further opined that Defendant was easily led. (T. 2736).

On cross, Herrera testified that Defendant told him the reason he committed the Hialeah crimes was because he wanted money. (T. 274 1). Herrera conceded that Defendant understood this "consequence" of his actions. (T. 2745). Defendant understood the

difference between right and wrong. (T. 2746). He knew that robbery, murder and theft were wrong. (T. 2746). Based upon the MMPI, Defendant did not suffer from any mental disorder, other than the organic condition. (T. 2747). The organic damage would be characterized as "mild." (T. 2749). Defendant understood that the purpose of the Kislak robbery was to get money, and that he might go to jail as a result. (T. 2756). He also understood these things with regard to the Van Nest and Hialeah robberies. (T. 2757).

Defendant also called Dr. Antonio Lourenco, the neuropsychiatrist who examined Defendant on October 7, 1989, at the request of Dr. Herrera. He took a very simple clinical history relating to symptoms such as seizures and accidents which could have resulted in brain trauma. (T. 2630-34). Defendant had suffered an Injury to his left eye. Defendant was fairly vague and extremely anxious. Defendant stated that he often had dizzy spells, mainly when he was under stress, although he had never had an actual seizure. (T. 2635). Defendant also stated that he had a history of head trauma, but he was a poor historian in terms of giving reliable details.

Lourenco administered a Q EEG, which is a qualitative topographic mapping test. The test is similar to an EEG, and determines whether there is any brain damage. Lourenco determined that Defendant had an abnormality in the left frontal and temporal area of his brain. (T. 2641-42). He would attribute it to scarring of the brain as a result of a concussion. (T. 2642). Lourenco also detected deep impulses and immaturity of the brain, meaning that the brain waves resembled those expected of one of younger age. Such would

be the product either of injury or improper development of the brain. (T. 2643).

Lourenco also found asymmetry in Defendant's invoking of responses to visual stimuli. His right-eye response was normal, but his left was considerably slower. (T. 2646, 2650-5 1). In such cases, the person can have difficulty in perceiving reality. (T. 265 1).

Finally, Lourenco administered the cognitive test. Defendant's results were of poor quality in that when the test was repeated several times, the results were inconsistent. (T. 2646, 2652). This indicated to him a lack of integrity in Defendant's brain. (T. 2648). In such cases, Lourenco stated, the person could have difficulty in perception, thinking, and controlling his emotions. (T. 2649, 2653).

Lourenco administered a second Q EEG to "activate," *i.e.,* reveal additional information. The first part was the hyperventilation test. (T. 2653). This test was negative, meaning there was no metabolic alteration of his brain. Likewise the classical opening and closing of the eyes did not reveal any abnormality. (T. 2654).

Lourenco concluded that Defendant had an old lesion on the left side of his brain which would result in poor judgment and poor impulse control. He would also have poor ability to retain new information. He could become moody, depressed, excited, irritable, or angry under stress and could not measure the consequences of his actions.

Lourenco stated that was not aware that Defendant had been told that the injury to his left eye, which was caused by scissors at age 5, was not reparable, even surgically, or that Defendant was unable to see with that eye. (T. 2667). Defendant's results were "mildly abnormal." (T. 2469). Lourenco clarified that Defendant was "at a high risk" of the mentioned behavior when under stress. (T. 2673). Lourenco agreed that every bank robber exhibits poor judgment. Further, Defendant's participation in the instant crimes also reflected poor judgment. (T. 2675).

Julio Calveiro was a deacon at the Church of Christ Breaks the Chains. He testified that Defendant had contacted his church after hearing its ministry on the radio. He first saw Defendant six months prior to the trial. He testified that he had seen Defendant a couple of times. Defendant changed for the better in that he had accepted Jesus Christ. (T. 2686-94).

Defendant next called Sergeant Kevin Gaberlavich, guard with the Dade County Department of Corrections, who testified that Defendant had been generally well-behaved while in the pretrial detention center. (T. 2764-2769).

Defendant called Estella Garcia, Defendant's aunt. (T. 277 1). She lost contact with her brother Luis, Defendant's father, when she left Cuba in 1962. Defendant, his parents, and his four siblings came to Miami from Cuba in 1980, and thereafter lived with Garcia for four months. (T. 2772-73). She felt her brother needed to discipline his children more. She also asserted that he (Luis) was an alcoholic, although she did not know how much he drank, just

that he did. (T. 2773). After being prodded by defense counsel, she also stated that her father was an alcoholic. (T. 2774). Garcia did not feel that Luis spent enough time with his children. (T. 2775). Garcia felt that Defendant's mother, Francisca, however, was "a very good mother," but could not control her children. (T. 2777). When they came to live with her, Garcia was in charge of the household and tried to instill discipline in the children. Defendant was about 13 when he came to live with her and was a very good boy. He got along with his cousins "perfectly well like a normal child." She would take the children to school and pick them up afterward. (T. 2779). After school, Defendant and the other children would stay around the house, "playing correctly." *Id.* Defendant behaved well and "normal." She saw no evidence that he was hyperactive. (T. 2780). He never gave her any trouble when he lived with her. *Id.* She had very little contact with the family after they moved out. *Id.* The last time she saw Defendant, at a Christmas gathering right before he was arrested, she thought he looked bad, and did not like his friends. He seemed to be nervous and unhappy. (T. 278 1-82). When she later saw him in jail, she thought he had again changed, was better and had accepted religion. (T. 2783).

Daisy San Martin, Defendant's younger sister testified about their home life in Cuba, which they left when she was eight. (T. 2784-85). She did not remember much, but they lived in a very small apartment there. (T. 2785). Their father worked and provided for the family, but would go out and drink after work. *Id.* She testified that Defendant would be hyperactive, and their father would get mad and chain him to the table. (T. 2786). After

Defendant got arrested, his father started drinking more, and their parents separated. (T. 2787). Their parents used to fight in front of them. *Id.* Defendant was a very good brother to her. (T. 2788). He took care of her more than any of the others. *Id.* The only change she noticed in Defendant was that he became more nervous right before his arrest, but he would not talk about it. *Id.* Since he had been in jail, Defendant wrote her and advised her to be good and to go to church. (T. 2790). On cross, Daisy testified that Defendant had never told her about his crimes. She also noted that they had also been provided food and shelter growing up, and that Defendant was the only one of his siblings to have gotten into trouble. (T. 2793).

Defendant's mother, Francisca San Martin, testified about his home life. (T. 2795). Although churches were outlawed by Castro, she still taught her children about religion. (T. 2795). Defendant was not any different than the other children, except that he could not stay still. She took him to a psychologist in Cuba for it. His older brother was also like that, but she never took them to doctors about it in the U.S. (T. 2796). Defendant never got into trouble as a child and played with the other kids. *Id.* Sometimes the father would tie Defendant down to keep him from running into the street. He would hit Defendant sometimes, too, but she would intervene. (T. 2797). Defendant's father was not affectionate to the children, and would go out with his friends after work until 7, 8, or 9 p.m. *Id.* Defendant's eye injury occurred when he was four, when he accidentally poked himself in the eye with a pair of scissors. (T. 2798). Defendant's father had been jailed in Cuba as a

political prisoner. (T. 2799). Francisca stated that until the present "problem" Defendant never did anything wrong. (T. 2800). Defendant attended school until he was seventeen. Thereafter, he "always" worked. (T. 2803). Defendant's grades were average, but he did not like to go, preferring to skip with his friends. (T. 2804). When he was a teenager, he fell and hurt his head twice. (T. 2804-05). Defendant was always affectionate with his parents and siblings, and treated them well. (T. 2805). Defendant seemed nervous and felt bad before he was arrested. (T. 2806). She always told him not to hang around with his codefendants and to stay out of trouble. *Id*. After he started hanging around with Franqui, Defendant went out a lot. *Id*. Since Defendant was arrested, he seemed more tranquil, and spoke of God. (T. 2808).

After closing arguments, instruction and deliberation, the jury recommended that Defendant be sentenced to life imprisonment. (R. 683).

A sentencing proceeding was held before the court on October 3, 1994, at which additional testimony was presented. (R. 785)[4] The State called Dr. Charles Mutter, a psychiatrist. (R. 789-90). Dr. Mutter evaluated Defendant on October 25, 1993. Since that time, he had also reviewed Defendant's confession in the instant case, as well as his own prior testimony and records from the Hialeah case. (R. 79 1). Mutter explained that brain

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[4] For reasons unknown, this portion of the proceedings is not chronologically located within the 16 volumes of the transcript, but rather is found in Volumes 4 and 5 of the record at R. 785-855.

mapping of the type conducted by Dr. Lourenco is of disputed validity in the profession, and in any event can only pinpoint the locations of brain lesions. It cannot explain the patient's behavior. (R. 792).

Upon examination of Defendant, Dr. Mutter believed that Defendant understood the consequences of his actions. (R. 792). Dr. Mutter further found that Defendant had no major mental disorder which would impair his ability to understand the propriety of his actions. Defendant knew and understood the difference between right and wrong. (R. 793). Dr, Mutter had no doubt that Defendant's behavior was "absolutely" goal directed in committing the instant crime. He understood the consequences of his actions. (R. 794). Defendant identified his motivation, and the very specific purposes of his actions. Defendant told Dr. Mutter that he knew he could get in trouble, and was very remorseful. He said that he had turned to religion, and knew that he had caused someone's death and knew he could get the electric chair. He just did not think they would get caught when they planned the crime. (R. 795).

On cross it was brought out that the items considered by Dr. Mutter, in addition to his own evaluation of Defendant included: Dr. Lourenco's report, Dr. Marina's deposition, the Hialeah police report, the Metro-Dade police report, statements of Antonio San Martin, of Defendant's father and mother, the depositions of Defendant's brother, two depositions of Dr. Herrera, another police report, Defendant's confession, and his own testimony from the Hialeah trial. (R. 796). In the depositions, the family members said there was never any

physical abuse of Defendant. The father would counsel him, and the mother was more strict verbally, but they never hit him. (R. 797). Dr. Mutter did not dispute the findings that Defendant had brain lesions or borderline intelligence. (R. 799). Although limited intelligence could be a factor if a person was never taught right from wrong, Dr. Mutter's examination of the records reflected that Defendant had been so taught. *Id.* As to whether Defendant was a concrete thinker, Dr. Mutter found that Defendant was marginal, but had some ability to abstract. Dr. Mutter "absolutely" rejected the contention that a concrete thinker would have difficulty understanding the consequences of his actions. (R. 80 1). That Defendant fired, rather than ran when fired upon (in the Hialeah case), did not show that he was a concrete thinker, but rather that he had bad judgment. In fact, Defendant's judgment was terrible: "If he had good judgment he wouldn't be sitting here." (R. 80 1). Dr. Mutter felt Defendant's reasoning was impaired, but not to the point where he did not understand the consequences of his actions. *Id.* Assuming, hypothetically, that one parent was "soft" and did not provide much guidance, the other was an alcoholic and physically abusive, and that Defendant had borderline intelligence and poor reasoning ability, Dr. Mutter would not change his opinions. (R. 804). Dr. Mutter felt that to accept the defense hypothesis as mitigating was a "total lack of acceptance of responsibility." *Id.* He pointed out that most individuals from such backgrounds do not become violent criminals. (R. 805). Although it could influence his behavior, it would not affect his ability to know the difference between right and wrong or the understanding of the consequences of his acts. (R. 806).

All the information presented by the family members at the previous trial was that Defendant was well treated by them as a child. (R. 809). Dr. Mutter specifically asked Defendant whether he was ever beaten or mistreated as a child. (R. 8 10). The fact that Defendant expresses remorse indicates that he knew the difference between right and wrong. *Id.*

On inquiry by the court, Dr. Mutter stated he was not really able to determine whether Defendant was sorry for what he had done, or sorry that he had been caught and was facing the present consequences. (R. 8 13). Dr. Mutter had never heard of any abuse of Defendant prior his present court appearance. (R. 8 14).

Dr. Lourenco was again called by the defense. (R. 8 15). Dr. Lourenco conducted a psychiatric evaluation of Defendant on September 30, 1994, the Friday before the hearing. (R. 8 17). He reviewed the reports of Mutter, Marina and Herrera, a synopsis of Defendant's confession, and his own notes. He also spoke to Defendant's mother the night before the hearing. *Id*. Mrs. San Martin gave an account of Defendant's childhood in her October 2, 1994, interview with Dr. Lourenco that was even more unpleasant than that she had detailed in her testimony the previous week. (R. 822-24). These two accounts were directly contradictory to her statements made a year earlier, as Dr. Mutter testified, that Defendant had had a good childhood. Defendant told Dr. Lourenco that he had never known the difference between right and wrong until he spoke with the pastor after his arrest. (R. 825).

Defendant also told him that he never knew about religion before then. (R. 824). His mother had previously testified that she taught him religion as child, however, despite Castro's ban on it. Defendant also now claimed to have experienced near-seizure dizzy spells for a long time. (R. 827). Dr. Lourenco believed Defendant just followed his friends and did not realize it was a robbery. He believed Defendant "was surprised when he found out that there was people hurt or killed," and Defendant "did not know what was going on," or that "he should run away, disappear instead of keeping in the place of the crime." (R. 829). Lourenco opined that Defendant was under the influence of an extreme mental or emotional disturbance "in a broader sense" in that Defendant was "surprised" by the shooting and picked up the money "without any thought about it." He further opined that Defendant was under the domination of Franqui. (R. 830). Lourenco testified that Defendant did not picture that it "would be essentially violent" to take the money. The "domination" apparently consisted of Franqui telling Defendant that he would be able to buy things he wanted with the money. (R. 83 1). Lourenco believed Defendant had a mental age of 12 or 13. (R. 833). Lourenco did not agree with Mutter's conclusion. (R. 8 34).

On inquiry by the court, Lourenco said that Defendant had told him that he understood the criminal nature of his conduct. (R. 853). Defendant did not understand it until after he spoke with the priest in jail, however. (R. 854).

On October 1 1, 1994, the trial court sentenced Defendant. (T. 3237-5 1). The court found the existence of three aggravating circumstances: (1) Defendant's multiple prior

violent and/or capital felonies; (2) that the murder was committed during the course of a robbery, which the court merged with the pecuniary gain aggravator; (3) that the murder victim was a law enforcement officer in the course of his official duties, merged with the avoid arrest aggravator. The court gave all three circumstances great weight. (R. 757-59).

The trial court found that no statutory mitigating circumstances existed. (R. 759-65). Of 16 nonstatutory mitigating circumstances proffered by the defense, the court found that Defendant had proven two: (1) that Defendant had turned to religion for peace of mind; and (2) that Defendant had little parental guidance, (R. 765-69). The court accorded these mitigators little weight. (R. 769). The court specifically conducted an "*Enmund-Tyson* analysis" and concluded that Defendant was a major participant in the crime, intended lethal force to be used, and had exhibited a reckless indifference to human life:

> The facts of this case clearly establish that, at the very least, the defendant intended that lethal force be employed and that he was a major participant in a felony that resulted in Officer Bauer's death and his mental state was one of reckless indifference. The defendant knew the intended target. He knew that the target was no an easy mark; he knew that there would be a police officer or armed guard protecting the tellers; he knew or should have known that the officer would not just allow the robbery to happen; he knew that his accomplices were armed and he knew that his accomplices, like himself were extremely violent men. Additionally the defendant had already attempted a bank robbery where he aimed a pistol at a security guard and opened fire and, less than thirty days earlier, had attempted an armed robbery during which a man was murdered.

(R. 771-72).

The court further found that although the jury's recommendation of life was entitled to great weight, the evidence conclusively showed that death was the appropriate penalty:

> The mitigating circumstances in this case simply do not stand up to the scrutiny of logic and rational thought. The psychological testimony reflects an analysis which completely ignores the defendant's behavior in this case as well as his behavior in the other violent crimes he has committed. The non-statutory mitigating circumstances the court has found pale when compared to the great weight that must be afforded the aggravators herein. The court therefore finds that the facts suggesting the death penalty in this case are so clear and convincing that virtually no reasonable person could differ.

(R. 773-74). The sentencing judge concluded the jury's recommendation should be overridden and sentenced Defendant to death. (R. 775).

This appeal followed.

SUMMARY OF THE ARGUMENT

1. Defendant claims that the trial court erred in failing to grant his motion for severance based upon the fact that his nontestifying codefendants' statements were introduced at trial. However, the statements were virtually identical in all material aspects and the surrounding circumstances were such that it was proper to admit the statements at the joint trial. Even if they should not have been admitted, the error would be harmless beyond a reasonable doubt where all the forensic and eyewitness evidence fully corroborated the statements.

2. Defendant claims that his confession and that of his codefendant should have been suppressed. The claim regarding his intelligence level and the fact that he declined to give a recorded statement were not raised below and should be rejected. As to the preserved claims, the trial court, in an extensive written order, found Defendant's factual claims to be unworthy of belief and his confession voluntary. That determination is supported by the evidence and should not be disturbed. Finally, Defendant is without standing to assert his codefendant's *Miranda* rights.

3. Defendant's claims regarding the State's alleged misconduct during voir dire and use of peremptory challenges were not preserved for review. In any event, Defendant has not shown that the State exercised its peremptory challenges, or otherwise conducted the voir dire, in an impermissible manner. Likewise, Defendant's argument that he was entitled to individual

sequestered voir dire of the jurors on the issue of the death penalty is without merit.

4. As is well settled, Defendant was not entitled to a special verdict form indicating whether the jury found him guilty of premeditated or felony murder.

5. In his fifth claim, Defendant asserts that there was insufficient evidence to convict him of premeditated first degree murder. This claim is wholly without merit. Firstly, the evidence was more than sufficient to support felony murder charges. The jury does not have to, and did not, specify which it found Defendant guilty of. Further, the evidence bespeaks of a clear intent to kill where the attackers exited their vehicle and almost immediately opened fire upon Officer Bauer. Moreover, as a principal, Defendant was as guilty as his codefendants Franqui and Gonzalez, who shot the officer.

4. The trial court did not err in allowing the robbery victims to testify regarding the murder victim's last words. The testimony was an integral part of the sequence of events surrounding the crime, and proved the element of the crime charged that Officer Bauer was a law enforcement officer acting in the course of his official duties when killed. Furthermore, the testimony was very brief and was not dwelt upon by the State, and as such any error would be harmless.

7. Defendant's seventh claim, that certain evidence pertaining to his codefendants was improperly admitted against him, is so vague as to defy response, and in any event, any

such evidence would properly have been admitted against Defendant as a coprincipal.

8. It is well settled that both the State and the defense may call witnesses to testify before the court after the jury has issued its recommendation, and as such Defendant's eighth claim is wholly without merit.

9. Defendant's ninth claim, that he was denied the assistance of a mental health expert, is entirely without merit where he was appointed three experts who examined him before trial, two of those experts testified on his behalf before the jury at the penalty phase, and where, despite the trial court's refusal to grant yet another expert before the sentencing hearing in front of the judge, Defendant was able to have one of his three experts, a psychiatrist, examine him again and testify at that hearing.

10. The trial court properly rejected Defendant's proffered mental health mitigation where it was internally inconsistent and bore no relation to the objective facts. Further, the trial court properly overrode the jury's recommendation of life where there was minimal nonstatutory mitigation proved and substantial aggravation including several prior violent felonies, one of which was a murder for which Defendant had received the death penalty.

11. Defendant's attacks on the constitutionality of the death sentence are unpreserved and have been repeatedly rejected.

12 Defendant was properly sentenced to death where, although not the "trigger-man," there was ample evidence that Defendant intended lethal force to be employed, was a major participant in the robbery and his mental state was, at the very least, one of reckless indifference for human life. Finally, Defendant's sentence is proportional.

ARGUMENT

I.

THE TRIAL COURT PROPERLY REFUSED TO SEVER DEFENDANT'S TRIAL FROM THAT OF CODEFENDANTS FRANQUI AND GONZALEZ.

Defendant contends the trial court erred in failing to sever his trial from that of non-testifying codefendants Franqui and Gonzalez.[5] He asserts that the statements of Franqui and Gonzalez should not have been admitted against him because it did not sufficiently "interlock" with his. However, a review of the three statements, as well as the other evidence presented shows that the codefendants" statements were independently reliable and thus admissible against Defendant. Under such circumstances, severance was not mandated. Further, any alleged error would be harmless beyond a reasonable doubt.

In *Cruz v.* New *York,* 48 1 U.S. 186, 107 S. Ct. 1714, 95 L. Ed. 2d 162 (1987), the Supreme Court held that a nontestifying codefendant's incriminating statement should not be admitted at a joint trial, unless the statement would be directly admissible against the defendant under lee *v. Illinois,* 476 U.S. 530, 106 S. Ct. 2056, 90 L. Ed. 2d 5 14 (1986).

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[5] Franqui conceded on appeal that Defendant's statement was properly admitted against him, arguing only that Gonzalez's should not have been admitted. (No. 84701, Brief of Appellant at 33). Codefendant Fernandez, of course, was severed.

Defendant's complalnts regarding redactions are wholly without merit. Although the subject was discussed at length before trial, the court ultimately ruled that no redactions would be made to the defendants' statements, except to delete references to other crimes. (R. 128).

[6] In the interest of brevity, the term "codefendants" will be used, for the purposes of Argument I, to refer only to Franqui and Gonzalez.

Here, the codefendants' statements would have been admissible against Defendant under *Lee,* and as such, the denial of severance was proper.

Under lee, a non-testifying codefendant's statement is generally considered hearsay and may not be admitted without violation of the Sixth Amendment unless it is supported by a showing of a particularized guarantee of trustworthiness. Where the codefendant's statement is "thoroughly substantiated by the defendant's own confession," *i.e.,* where any discrepancies between the statements are not significant, the codefendant's confession may be admitted. *Id.,* 476 U.S. at 546. Because the statements in lee differed in material aspects, e.g., the roles of the defendants in the crime and the issue of premeditation, and because the surrounding circumstances did not provide any indicia of reliability, the Court found that the statement should not have come in. *See Grossman v. State,* 525 So. 2d 833, 383 (Fla. 1988). Further, the courts will look to the circumstances surrounding the making of the out-of-court statement in determining its reliability. *lee; Idaho v. Wright, 497* U.S. 805, 1 10 S. Ct. 3 139, 111 L. Ed. 2d 638 (1990).

Contrary to Defendant's assertions, and unlike the statements in lee, the statements in question here did not differ in any material respect. On the contrary, a comparison of these statements, each taken by a different detective several weeks after the crime, shows that they are to a remarkable degree identical.

Defendant stated that he, Franqui, Gonzalez, Femandez and Abreu were involved. The idea of robbing the bank was originated by a friend of Femandez's, a black male. (T. 1585). They had come up with the plan about a week earlier.[7] (T. 1587). They stole two Chevrolets to carry out the robbery. (T. 1688).

Franqui stated that he, Defendant, Gonzalez, Fernandez and Abreu were all involved in the robbery but that only he and Gonzalez were armed. (T. 1669). Franqui said that he first became aware of the plan between Christmas and New Years, from Fernandez. *Id.* A black man who was a friend of Femandez's originally came up with the plan. (T. 1670). The plan was to steal two similar vehicles. (T. 1671).

Gonzalez said he met Franqui around Christmas 199 I, who advised him they were doing a "job" and asked him if he wished to join. The job involved a robbery of a bank drive-through, two female tellers with cash boxes with a lot of money. Franqui said it would be easy, but there was security. (T. 1390). Gonzalez said that Franqui said it would be on a Thursday or Friday. It ended up being the latter. Franqui said the plan was to steal two cars. (T. 1392-93).

Defendant stated that on the morning of January 3, 1992, they met at Defendant's house. (T. 1588). In addition to the two Chevys, Abreu drove Franqui's Buick. (T. 1589).

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[7] The crime took place on January 3, 1992.

The four defendants went to the bank in the two Chevys and Abreu waited a few blocks away in Franqui's Buick. When they got to the bank, Defendant crouched behind one of the drive-through pillars. Then the two women and the police officer came out. Then suddenly shots were fired at the officer. (T. 1590).

According to Franqui, on the morning of January 3, 1992, they met at Defendant's house. (T. 1674). From there they went to the bank, first stopping to leave Franqui's Buick Regal with Abreu nearby while the other four went on to the bank in the two stolen Caprices. (T. 1675). Franqui and Gonzalez were in one, with Franqui driving; Defendant and Fernandez were in the other. Fernandez drove the second vehicle. Franqui said that he had a 9mm and Gonzalez had a .357 revolver. (T. 1676-77). Franqui's car was closest to the bank and the other was next to it. All four exited the vehicles, and both Franqui and Gonzalez pulled their guns after the tellers came out of the bank building. (T. 1678).

According to Gonzalez, on January 3, 1992, Franqui picked up Gonzalez and they met with Defendant. (T. 1493). Then they drove to where the Chevys were to meet the other two people. Then they went and parked near the bank. Franqui drove the car Gonzalez was in. (T. 1394). Gonzalez had a .38 and Franqui had a 9mm. When the tellers and the officer exited the bank, Franqui jumped out of the car, and so did Gonzalez. (T. 1395).

Defendant could not see who was shooting. After the shooting stopped, the officer was laying in the drive-up area, apparently wounded and Defendant ran up and grabbed the money

tray that was dropped by one of the tellers, as was planned. (T. 1587, 1590). Then he ran and got into one of the Chevrolets. (T. 159 1).

According to Franqui, Gonzalez yelled freeze, and then he heard a gunshot. The guard was unholstering his 9mm, but Franqui was not sure who shot first. Franqui then fired once toward the guard and fled back to the vehicle. (T. 1679-80). The job of Fernandez and Defendant was to actually take the money. (T. 168 1).

Gonzalez said that Franqui ran within 12 feet of the officer and told him not to move, in Spanish. The officer went for his gun and Franqui fired. Gonzalez said he fired also. Defendant grabbed the cash box and ran back to the car. (T. 1396).

Per Defendant, they fled and went to meet Abreu. They dumped the stolen cars and took off in the Regal. (T. 159 1). Later that day they counted the money, and Defendant received $3,000. (T. 1592). Defendant first stated that he had thrown the guns into the ocean, and then said they were in the Miami River. (T. 1755-59). Franqui also stated that they then drove to where Abreu was waiting and all five fled in the Buick. (T. 1679-80). When they split the money up, Franqui received $2400. (T. 168 1). Both guns were left at Abreu's house and he never saw them again, but Abreu and Defendant told him that they had thrown them into the water somewhere. (T. 1682, 1716). Gonzalez likewise stated that they then fled the scene, ditched the Chevys and got away In Franqui's Regal. (T. 155 1-54). Gonzalez said they had divided the money at Defendant's apartment and he got $1500. (T.

1533-34).

As is clear from the foregoing, these statements were virtually identical in their description of the plan, the carrying out of the robbery, including the roles each player carried out, and the ultimate disposition of the loot and the weapons. In addition to their interlocking nature, none of the codefendants was present when the others confessed, and further neither Franqui nor Gonzalez attempted to inculpate Defendant in the actual shooting.

In sum, the statements of Franqui and Defendant were fully consistent in every *material* aspect. Additionally, unlike the situation in lee, the circumstances surrounding the taking of the statements do not call into question their reliability. The statements were given to different officers, and although the defendants were informed their cohorts were confessing, the statements as given do not reflect any attempt to cast responsibility on the others. Rather, both Franqui and Gonzalez consistently stated who had which gun (despite the fact that both guns were at the time of the confessions under ten feet of water in the Miami River).[8] All three defendants consistently described a final planning period occurring during the week after Christmas, and all share the same sequence of events. Furthermore, there is no evidence that either defendant was encouraged to incriminate the other. These statements are independently reliable and were properly admitted at the joint trial.

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[8] Defendant did not know who shot or who had which gun. However, all three stated that Defendant's only job was to snatch the money.

Finally, assuming, *arguendo,* that the codefendants' statements were not sufficiently reliable to be admitted substantively against Defendant, rendering the failure to sever a *Bruton*[9] violation, any error is subject to harmless error analysis. *See Cruz, 95* L. Ed. 2d, at 172; *Harrington v. California, 395* U.S. 250, *89* S. Ct. *1726, 23* L. Ed. 2d *284* (1969); *Grossman v. State,* 525 So. 2d 833 (Fla. 1988). As discussed, Franqui's and Gonzalez's confessions corroborated Defendant's in every material aspect. Furthermore, the testimony of the eyewitnesses and the physical evidence was overwhelming and also corroborated the statements. As noted above, both codefendants identified guns which were in the river at the time their statements were given. The bullets removed from Bauer's body were fired, one each from those guns, to the exclusion of "every other gun in the world." Likewise, the casing found at the scene was positively identified as coming from Franqui's gun. Two other spent bullets were recovered from the scene -- a .38 positively matched to Gonzalez's gun, and a 9mm which was consistent with Franqui's gun.[10] Battle and Ellis corroborated the type of vehicles which were used. Of course, the stolen vehicles themselves, one bearing the fingerprints of Femandez and Franqui, were found, engines running and column locks punched out, two blocks from the scene, in the direction Battle and Ellis said they headed. Further

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9 *Bruton v. United States, 391* U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968).

10 Franqui's 9mm is the only 9mm of which there is any evidence of having been fired at the scene. Bauer carried a 9mm also, but as noted above, it was completely full of unfired cartridges, which means Bauer could not have fired. There is no evidence of any other 9mm's having been present.

Battle positively identified Franqui as the driver of one of the cars. Likewise the teller and Ellis both testified that the men had their guns drawn when they emerged from the drive through. Finally, all three testified identically as to Defendant's role. In short, the admission of the statements could not have had any probable impact on the *jury. Harrington.* Defendant's convictions should be affirmed.

II.
THE TRIAL COURT PROPERLY REFUSED TO SUPPRESS DEFENDANT'S CONFESSION.

As his second issue Defendant raises multiple claims regarding the failure to suppress the confessions given by him and his codefendants Franqui and Gonzalez, including the contentions that they were not voluntary because Defendant had "borderline" intelligence and Franqui was a "moron," (B. 58), because Defendant's confession was the product of delay, (B. 59), because of the defendants' alleged prior invocation of counsel, (B. 60), and because the police did not record Defendant's statement. (B. 6 1). The claims regarding Defendant's intelligence level and the fact that Defendant declined to give a formal statement were not raised below as grounds for suppression and may not now be considered. The remaining claims are factually unsupported and legally without merit. Finally, to the extent Defendant is challenging the failure to suppress his codefendants' statements, (B. 69), he is without standing to do so.

At no point below did Defendant raise the claims regarding his intelligence level or in any way suggest that his statement was inadmissible because he declined to give it formally. As such these claims may not now be raised on appeal, and must be rejected. *Robinson v. State,* 487 So. 2d 1040, 104 1 (Fla. 1986)(claims regarding the admission of confession will not be considered on appeal where they differed from grounds raised below); *Henry v. State,* 586 So. 2d 1033, 1035, n. 3 (Fla. 1991)(same).

With regard to the remaining two claims, a lengthy evidentiary hearing was held below with regard to the defendants' motions to suppress. (T. 95-149, No. 83,611, T. 54-420).[11] The trial court thereafter issued an extensive written order denying the defendants' motions to suppress. (R. 301-22). Where the trial court has explicitly found that a defendant's statement was voluntary and should not be suppressed, that finding should not be disturbed on appeal unless the defendant demonstrates that the findlng was clearly erroneous. *Jones v. State,* 440 So. 2d 574 (Fla. 1983), *cert. denied,* 449 U.S. 986, 101 S. Ct. 407, 66 L. Ed. 2d 250 (1980). The ruling of the trial court comes to this court with the same presumption of correctness that attaches to jury verdicts and final judgments. *Stone v. State,* 378 So. 2d 765 (Fla. 1979), *cert. denied, 449* U.S. 986, 101 S. Ct. 407, 66 L. Ed. 2d 250 (1978).

In its order, the trial court summarized the evidence presented as follows:

> On January 18, 1992, Detective Mike Santos of the Metro Dade Police Department and Special Agent Dorothy Ingrahm [sic] of the Florida Department of Law Enforcement went to the ICDC Annex of the Dade County Jail and contacted Pablo San Martin. The defendant agreed to accompany the

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[11] With the exception of his January 19, 1992, statement regarding the location of the guns, Defendant stipulated to the suppression testimony and rulings (without waiving his objections thereto) in the Hialeah case, which is presently pending before this court, No. 83,611. (T. 103, 109, 119). As such, the State would request that the Court take judicial notice of the proceedings in that case to the extent relevant.

As such, it also follows that Defendant's complaint, (B. 54), that the trial court's consideration of the proceedings in the Hialeah case denied him a fair trial, is without merit.

officers to the Metro-Dade Police Department. San Martin was picked up at ICDC at approximately 1 1:30 am and transported to the police station. At approximately 12:00 p.m. the defendant was placed in an interview room and his handcuffs were removed. Because the defendant has difficulty speaking English, Detective Santos read him his *Miranda* rights in Spanish. San Martin listened to his rights and acknowledged that he understood them. He indicated that he did not want a lawyer present and agreed to speak to the detective. The defendant was thereafter questioned by Detective Santos reference the North Miami murder. During the interview, detective Santos took breaks and provided the defendant with food and drink.

At some point in time Detective Santos was approached by Detectives Nabut and Nazario of the Hialeah Police Department and was advised that San Martin had been implicated in the Hialeah murder. Santos advised Nabut and Nazario that the defendant had already been advised of his rights and had freely and voluntarily waived them and agreed to speak to police without a lawyer present. Nabut and Nazario spoke to the defendant and he confessed to his involvement in the Hialeah murder case.

On January 2 1, 1992, Nabut and Nazario visited the defendant at the ICDC Annex and conducted another interview. Before speaking to the defendant, Nabut again read him his constitutional rights off the *Miranda* card. Although the defendant waived his rights verbally he refused to execute a written waiver. At no time during the interview did the defendant indicate any reluctance to speak to the detective nor did he request the assistance of counsel.

The defendant testified that he was picked up by Detective Santos at the ICDC Annex and taken to the police station. He stated that although he was advised of his constitutional rights he did not understand them. He therefore asked the detectives to read them to him again. When Santos got to the right to counsel the second time, the defendant says he told Santos that he did want a lawyer.

According to the defendant the questioning continued and he became increasingly intimidated because he suffers from bad

> nerves and he could "feel" that the others were being beaten in the adjoining rooms. He said that he signed the rights waiver form because he was afraid.
>
> The defendant testified that on January 2 1 , 1992, he was once again approached by Nabut at the jail. Nabut advised him of his rights and once again the defendant says he asked for a lawyer. Nabut ignored his request and proceeded with the interview. The defendant testified that although Nabut never threatened him, he was afraid he would be beaten if he did not answer the detective's questions.

(R. 313-15)

Based upon the evidence presented the trial court rejected the "delay" claim as without factual support:

> The defendant's motion to suppress argues, in very general terms, that his confession was not freely and voluntarily made. In support of this general allegation, the motion refers to the amount of time the defendant was at the police station and equates that time with the time the defendant was actually being interrogated. This suggestion ignores the very persuasive testimony of the detectives herein who specifically stated that during substantial periods of time on January 18, 1992, the defendant was not being questioned. At times the questioning of San Martin ceased while detectives stepped outside the interview room to share their information with their supervisors and other detectives who were interviewing other defendants. Other times the questioning stopped so the defendant could eat or drink. Consequently, this court finds that to equate the amount of time the defendant spent at the police station and the amount of time the defendant was interrogated is grossly misleading. This court is persuaded by the highly credible testimony of the detectives herein who testified that the defendant freely and voluntarily waived his rights; that he agreed to speak to the police without a lawyer and that he fully cooperated with the interview process.

(R. 315-16).

In *United States v. Stage,* 464 F.2d 1057 (9th Cir. 1972), upon which Defendant relies, the court held that keeping a defendant incommunicado for *five days* rendered his confession involuntary as a matter of law. Such is plainly not the case here. Although Defendant was in the police station for most of the day in question, the time spent with regard to this case and the confession in question was only a few hours. It must be recalled that the reason Defendant spent as much time as he did at the station is because he was involved in three robberies and/or murders which he had committed in three separate jurisdictions within Dade County. It must also be recalled that Defendant was at the time he gave the confession in question already in custody on other charges. As such, this is not a situation where the defendant confessed simply so he could go home. As the trial court properly concluded, all the evidence (except Defendant's own self-serving statements which were contradicted by the other witnesses) shows that Defendant's confession was freely and voluntarily given. Thus Defendant's vague claim of "delay" must be rejected.

The trial court also rejected any claim that Defendant was denied his Sixth Amendment right to counsel:

> San Martin further alleges in his motion that the "police officers questioning the defendant ignored the fact that the defendant was in custody in a separate matter and was already represented by counsel. The interviews conducted by those officers were conducted without prior notification of counsel and in the absence of counsel." San Martin argues that his invocation

> of his right to counsel on January 19, 1992, in this case, renders his statements to Nabut and Nazario inadmissible as it was taken in violation of his right to counsel under the sixth amendment of the Constitution of the United States. As set forth above the sixth amendment right to counsel is offense specific. Detectives Nabut and Nazario were not investigating the Bauer homicide when they questioned SAN MARTIN on January, [sic] 21, 1992. Although they were part of the task force investigating the many crimes committed by these defendants each detective within that task force was investigating a different crime. On January 2 1, 1992 Nabut and Nazario were investigating the murder of Raul Lopez. Accordingly the invocation of the sixth amendment right to counsel in the present case did not prohibit these officers from questioning this defendant reference to an unrelated homicide.

(R. 3 15-3 17).

As indicated in the above passage, the trial court had previously explained, correctly, that Franqui's denial of counsel claim was also without merit:

> First, he claims that his invocation of his right to counsel, formally executed . . . should invalidate any subsequent statement taken from him by police agents. The defendant stands upon his rights as guaranteed by the Fifth, Sixth and Fourteenth Amendments of the Constitution of the United States.
>
> In *McNeil v. Wisconsin,* 1 1 1 S. Ct. 2204 (1991) the Supreme Court of the United States addressed the issues herein and decided them against the defendant. In *McNeil* the Court of Appeals in the State of Wisconsin, noting that the issue had never been addressed by the Supreme Court of Wisconsin certified the following question:
>
> > Does an accused's request for counsel at an initial appearance on a charged offense constitute an invocation of his Fifth Amendment right to counsel that precludes police interrogation on unrelated, uncharged offenses?

In addressing the defendant's Sixth Amendment right the Supreme Court stated:

> The Sixth Amendment right . . . is offense-specific. It cannot be invoked once for all future prosecutions, for it does not attach until a prosecution is commenced, that is, "at or after the initiation of adversary judicial criminal proceedings -- whether by way of formal charge, preliminary hearing, indictment, information, or arraignment."'

Clearly under the Sixth Amendment Franqui's claim fails since the invocation of right to counsel at issue here was executed in the armed robbery case and not in the present case.[2]

The next issue for consideration is precisely the same issue certified by the Court of Appeals of Wisconsin to its Supreme Court, i.e., does the Fifth Amendment extend to the defendant the protection he seeks? In *Edwards v. Arizona,* 101 S. Ct. 1880 (198 1) the Supreme Court "established a second layer of prophylaxis for the *Miranda* right to counsel by holding that once a defendant asserts the right not only must all questioning stop but he may not be approached for additional interrogations "until counsel has been made available." 101 S. Ct. at 1884-1885. The Court has subsequently held that counsel must actually be present subsequent to the initial invocation.[3] Additionally, the *Edwards* rule is not offense-specific, "once a suspect invokes the *Miranda* right to counsel for interrogation regarding one offense, he may not be reapproached regarding *any* offense unless counsel is present." *McNeil,* 1 1 1 S. Ct. at 2208.[4]

In *McNeil,* as in the present case, the defendant waived his *Miranda* right to counsel on every occasion he was interrogated. His legal contention on appeal was that his waivers were not valid because his prior invocation of the offense-specific Sixth Amendment right in the armed robbery case for which he had been arrested was also an invocation of his non-offense-specific *Miranda-Edwards* right. The Supreme Court rejected this argument by distinguishing the purpose of each right. The Court

explained that the purpose of the Sixth Amendment right is "to protect the unaided layman at critical confrontations" with his "expert adversary," the government, after "the adverse positions of government and defendant have solidified" with respect to a particular alleged crime. *Gouveia,* 104 S. Ct. at 2298. The purpose of the *Miranda-Edwards* guarantee is to protect the suspect's "desire to deal with the police only through counsel." *Edwards,* 101 S.Ct. at 1884. The Court went on to say in footnote 3:

> We have in fact never held that a person can invoke his *Miranda* rights anticipatorily, in a context other than "custodial interrogation"... Most rights must be asserted when the government seeks to take the action they protect against. The fact that we have allowed the *Miranda* right to counsel, once asserted, to be effective with respect to future custodial interrogation does not necessarily mean that we will allow it to be asserted initially outside the context of custodial interrogation, with similar future effect.

Based on this reasoning, the court rejected the defendant's claim in *McNeil*.

As indicated above the defendant Franqui's situation in the present case is identical to that of the defendant in *McNeil.* Franqui's invocation of his right to counsel in his robbery case, like in Mr. McNeil's case, protected him only as to further police interrogation in the robbery case.

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[1] Citing *United States v. Guuveia, 104* S. Ct. 2292 (1984); *Kirby v. Illinois, 92* S. Ct. 1877 (1972).

[2] *See* also *Trudy v. State,* 559 So. 2d 641 (Fla. 3d DCA 1990), vacated, *Florida v. Trody,* 111 S. Ct. 2845 (1991), *on remand, Trudy v. State,* 586 So. 2d 440 (Fla. 3d DCA 1991).

[3] *See Minnick v. Mississippi, 1* 1 1 S. Ct. 486 (1990).

[4] *See* also *Arizona v. Roberson,* 108 S. Ct. 2093 (1988).

(T. 308-11)(footnotes in original). See also *Traylor v.* State, 596 So. 2d 957, 972-73 (Fla. 1992)(prior invocation of counsel in unrelated case not relevant to determination of voluntariness of confession).

Thus the only effective invocation of counsel which could have been relevant to this case would have been one made during the subject interrogation. However, the court rejected, as without factual support, the Fifth Amendment-based denial of counsel claim:

> The Court rejects as not credible, the defendant's testimony that he invoked his right to counsel . . .
>
> * * *
>
> As concerns SAN MARTIN'S fifth amendment right to counsel, the same analysis conducted above in FRANQUI'S situation above is applicable to SAN MARTIN. This right could not be anticipatorily invoked for all future situations and, according to footnote 3 of *McNeil* "must be asserted when the government seeks to take the action they protect against."

(R. 316-317).

Here Defendant has not shown that the court's findings were clearly erroneous. On the contrary, the trial court's findings are legally correct and amply supported by the record and should be affirmed. *Jones; Stone; Henry.*

Finally, as to Gonzalez's and Franqui's confessions, Defendant is without standing to

contest their voluntariness. *McKenney v. State, 388 So.* 2d 1232, 1234 (Fla. 1980)(defendant may not raise alleged violation of another's *Miranda* rights).[12] In view of the foregoing the trial court properly refused to suppress Defendant's confession. Defendant's second claim must be rejected.

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12 The State would submit that even if Defendant had standing, there was no error in refusing to suppress Franqui's statement, which is borne out by the fact that Franqui himself did not even raise the issue of the voluntariness of his confession in his own direct appeal. See Brief of Appellant, *Franqui v. State,* Florida Supreme Court case no. 84,701 (opinion pending). Gonzalez has not yet filed his brief in Florida Supreme Court case n. 84,84 1, and Fernandez abandoned the issue below. (T. 83-84).

III.

DEFENDANT'S JURY WAS NOT IMPROPERLY "DEATH-QUALIFIED," NOR WAS HE ENTITLED TO INDIVIDUAL SEQUESTERED VOIR DIRE ON THE ISSUE OF THE DEATH PENALTY.

Defendant's third contention is that he was denied due process because of the State's alleged use of voir dire to improperly "proselytize" the jury in the State's favor and by the State's alleged use of peremptory challenges to exclude venire members who were opposed the death penalty. He further objects to the trial court's refusal to conduct individually sequestered voir dire. The first two contentions are procedurally barred; all three are substantively without merit.

To preserve a claim of prosecutorial misconduct for review, the defense must interpose a contemporaneous objection at trial. *Ferguson* v. *State,* 417 So. 2d 639, 641 (Fla. 1986). Despite his contention that "the prosecutor overdid it in the extreme," (B. 64), Defendant offers only one record cite to alleged prosecutorial overreaching. There are no defense objections in the cited passage. As such this claim may not now be raised.

Furthermore, even if the claim were preserved, it would be without merit. Although Defendant accuses the prosecutor of having gotten "everybody mixed up," (B. 64), regarding the liability of principals and the felony murder rule, such does not appear in the record. On the contrary, it appears that the prosecutor accurately explained the concepts in question and properly inquired of the prospective jurors whether they understood them and could follow

them. See T. 526-30. This portion of Defendant's third claim should be rejected.

Defendant's claim regarding the striking of jurors for their views on the death penalty is also without merit. To preserve an issue regarding the use of a peremptory challenge for appellate review, the party seeking review must make an explicit objection on the record at the time of the strike. *Windom v. State,* 656 So. 2d 432, 437 (Fla. 1995); *Thomas v. Wainwright,* 486 So. 2d 574 (Fla. 1986)(objection to peremptory strike of death-scrupled juror not preserved where no objection at trial); *Bundy* v. *State,* 471 So. 2d 9, 19 (Fla. 1985) *(Witherspoon* issue barred where not raised at trial). *See also, Ross v. Oklahoma, 487* U.S. 81, 108 S. Ct. 2273, 101 L. Ed. 2d 80 (1988)(noting that peremptory challenges are a matter of state law, and that procedural bar relating thereto was constitutionally permissible). Here, the State was permitted to exercise eight peremptory strikes.[13] None of these strikes was challenged on the grounds here argued.[14] As such this claim has not been preserved for review. *Windom; Thomas; Bundy.*

Furthermore, assuming, *arguendo,* that the issue had been preserved, Defendant offers

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[13] Alacam, (T. 792); Pascual, (T. 796); Rocha, (T. 791); Tamowicz, (T. 807); Stephens, (T. 8 12); Martinez, (T. 82 1); Neloms, (T. 820); and Swain, (T. 822).

[14] Four of the strikes were challenged under *State v. Neil,* 457 So. 2d 48 1 (Fla. 1984): Pascual, (T. 796); Tarnowicz, (T. 807); Stephens, (T. 8 12); and Neloms, (T. 820); but only on the grounds of race or gender. The State provided race-neutral reasons for the strikes which the trial court accepted. (T. 796, 807, 8 12, 820). The remaining strikes were not challenged by the defense at all.

no legal support for his position that the facts which he alleges form a basis for relief. Defendant does not now challenge the propriety of the granting of the challenges for cause which were objected to below. Nor does he contest the resolution of the *Neil* challenges to the State's exercise of its peremptories. Rather, he vaguely asserts that due process somehow entitles him to a jury which includes persons who state they can follow the law, yet who nevertheless have serious questions about the propriety of the very law they must follow. The State is aware of no principles which require such a conclusion. Defendant provides none; on the contrary, he recognizes the decision in *Lockhart v. McCree, 476* U.S. 162, 174- 177, 106 S. Ct. 1758, 90 L. Ed. 2d 137 (1986), in which it was held that there is no right to have persons opposed to the death penalty, "or for that matter any other group defined solely by shared attitudes" serve on petit juries. Likewise, Florida law is clear that the use of peremptories by any party is limited only by the rule that they may not be used to exclude members of a "distinctive group." *Neil* (race); *State v. Alen,* 6 16 So. 2d 452 (Fla. 1993) (hispanic ethnicity); *Abshire v. State,* 642 So. 2d 542 (Fla. 1994) (gender). All of these classes are based upon discrete groups which are defined by immutable characteristics, and/or which are constitutionally protected based upon such status. *Lockhart* makes it quite clear that personal opinions do not form the basis of such a protected class. *Id.,* 476 U.S. at 177. Indeed, opinions are precisely the sort of factor upon which peremptories are properly based. See *Holland v. Illinois, 493* U.S. 474, 480, 110 S. Ct. 803, 107 L. Ed. 2d 905 (1990)(state has right to exclude on peremptory challenge "persons thought to be inclined

against their interests"). See also *Purkett v. Elem*, 514 U.S. ___, 115 S. Ct. 1769, 131 L. Ed. 2d 834, 839 (1995)(striking of persons with facial hair or long unkempt hair proper under *Batson*). This claim must be rejected.

Defendant's argument that he was entitled to individual sequestered voir dire of the potential jurors is also without merit. The granting of individual and sequestered voir dire is within the trial court's sound discretion. *Randolph v. State,* 562 So. 2d 331, 337 (Fla. *1990); Davis v. State,* 461 So. 2d 67, 69 (Fla. *1984); Stone v. State, 378 So.* 2d 765, 768 (Fla. 1980).

In *Randolph,* there was no factual basis demonstrating that the jurors might have been tainted by pretrial publicity at the time the motion was made. The trial court stated it would reconsider the motion if the need to do so arose during voir dire. The motion was not thereafter renewed and under the circumstances the Court found no abuse of discretion in declining to individually examine the venire members. Here the trial court agreed to, and did, conduct individual voir dire on the issue of pretrial publicity. (T. 249, 253, 260-389). As such, under *Randolph* there clearly was no abuse of discretion. Further, Defendant has made no showing that there was any adverse pretrial publicity, nor made any showing that he was in any way prejudiced. At the conclusion of the individual voir dire, nine cause challenges were granted. (T. 390). As such his claim must fail. See *Davis,* at 70 ("Davis has

demonstrated neither the partiality of his jury nor an abuse of discretion by the trial court, and we find no merit to this claim."); *Mu'Min v. Virginia,* 500 U.S. 415, 425-426, 1 1 S. Ct. 1899, 1 14 L. Ed. 2d 493 (199 1)("it is not enough that such questions might be helpful. Rather, the trial court's failure to ask these questions must render the defendant's trial fundamentally unfair."); *Pietri v. State,* 644 So. 2d 1347, 135 1 (Fla. 1994)(same).

Counsel below further argued that the jury should have been individually examined with regard to "the issue of the death penalty." (T. 246). Defendant presents no authority for the conducting of individual sequestered voir dire for reasons other than pretrial publicity. The State has located no such authority. It would further submit that the reasons for conducting such interviews do not present themselves in the context of so-called "death qualification issues."

The rationale for individual interrogation of venire members in the pretrial publicity context is to prevent a juror with knowledge of the case from revealing the substance of that knowledge to the other jurors, and thereby "tainting" the impartiality of the others. On the other hand questions regarding "death qualification" do not seek to elicit facts, but opinions based upon the prospective juror's individual conscience. Nevertheless, accepting, *arguendo,* that such sequestered voir dire may be undertaken, Defendant has failed to make any showing that the trial court abused its discretion or that he was prejudiced by having a partial jury seated; indeed substantial questioning on the subject of the death penalty was undertaken

during the multi-day voir dire conducted below. As such the claim must fail. ***Randolph; Davis;*** *Mu'Min; Pietri.*

IV.
DEFENDANT WAS NOT ENTITLED TO A VERDICT FORM WHICH SPECIFIED WHETHER HE WAS GUILTY OF FELONY OR PREMEDITATED MURDER.

Defendant's fourth claim is that he was denied all manner of due process because the verdict did not specify whether he was guilty of felony or premeditated murder. As Defendant notes in his brief, (B. 66), this contention has been repeatedly rejected. *Sochor v. State,* 619 So. 2d 285, 288, n. 3 (Fla. *1993); Turner v. Dugger,* 414 So. 2d 1075 (Fla. 1992); *Patten v. State, 598 So.* 2d 60 (Fla. *1992); Young v. State, 579 So.* 2d 721 (Fla. 1991); *Hahburton v. State, 561* So. 2d 248 (Fla. *1990); Buford v. State, 492 So.* 2d 355 (Fla. *1986); Brown v. State, 473* So. 2d 1260 (Fla. 1985). Furthermore, even assuming *arguendo,* that Defendant's contentions had any merit, any putative error would have been harmless, in that the evidence amply supports Defendant's conviction under either theory. See Point V, *infra.* Defendant's fourth claim must be denied.

V.

THE STATE PRESENTED EVIDENCE SUFFICIENT TO SUPPORT DEFENDANT'S CONVICTION OF FIRST DEGREE MURDER.

Defendant's fifth claim is that the evidence was insufficient to sustain a conviction of first degree premeditated murder. The simple fact is that the evidence presented to the jury was more than sufficient to sustain a first-degree murder conviction under either a theory of premeditation *or* felony-murder.

As discussed in Point IV, *supra,* there is no requirement that the jury specify whether its verdict finding Defendant guilty of first-degree murder was based upon a premeditation or felony-murder theory. Notwithstanding that fact, the evidence presented here was more than sufficient to support a conviction under either theory. There is no doubt that the murder occurred during the course of a robbery. There is further no doubt that Defendant intended that lethal force be used during that robbery. As such Defendant was properly convicted of first-degree felony murder, a fact which he does not appear to contest.

The evidence also supports a conviction based upon a premeditation theory. Defendant's assertion, (B. 68-69), that there was no evidence of a plan to kill is simply ludicrous. While no one testified that the defendants overtly planned to kill their victim, their actions speak thunderously. Franqui and Gonzalez dismounted their vehicle, guns blazing in the direction of all three victims. The bank had been staked out beforehand, and the

defendants therefore had to be aware that the tellers were protected by an armed police officer. The forensic evidence showed that four shots were fired by Defendant's accomplices, and none were fired by Officer Bauer. This evidence provided a compelling basis for the jury to have found that Defendant and his codefendants had a premeditated intent to cause the death of Officer Bauer.

The level of premeditation necessary to sustain a conviction for first-degree murder may be formed in a moment. *Spencer v.* State, 645 So. 2d 377, 38 1 (Fla. 1994). It "need only exist for such time as will allow the accused to be conscious of the nature of the act about to be committed and the probable result of the act." *Spencer,* at *38* 1; *Sochor v. State, 6 19 So.* 2d 285, 288-89 (Fla. 1993)(same). Premeditation may be established by circumstantial evidence, including the nature of the weapon used, the presence or absence of provocation, and the manner in which the homicide was committed. *Spencer* at 38 1; *Esty v. State, 642* So. 2d 1074, 1078 (Fla. 1994)(same); *Crump v. State, 622 So.* 2d 963, 971 (Fla. 1993)(same); *Holton v. State,* 573 So. 2d 284, 289 (Fla. 1990)(same); *Provenzano v. State,* 497 So. 2d 1 177, 1 18 1 (Fla. 1986)(same). Whether the premeditated design to kill was formed prior to the killing is a question of fact for the jury, *Spencer,* at 38 1, as is the determination as to whether the evidence of premeditation is inconsistent with any reasonable hypothesis of innocence. *Crump,* at 971. Where there is competent substantial evidence of premeditation, the jury's verdict will not be reversed on appeal. *Crump,* at 971.

Here the evidence was more than sufficient to prove that the defendants had formed the premeditated design to kill Bauer. *Young v. State, 579 So.* 2d 72 1, 723 (Fla. I 99 1) (evidence of premeditation sufficient where defendant armed himself, expressed a willingness to use his gun and fired first); *Bello v. State,* 547 So. 2d 9 14, 9 16 (Fla. 1989)(evidence of premeditation sufficient where defendant knew victim was attempting to enter room and defendant fired at an angle that would most likely hit and probably kill anyone attempting to open the door); *Sochor,* at 288-89 (sufficient time to form premeditated intent where defendant's brother interrupted assault on victim, defendant yelled at brother and returned to attack); *Provenzano,* at 1 18 1 (defendant removed loaded gun from jacket and commenced to fire on victim); *see also Murray v. State,* 49 1 So. 2d 1 120, 1 123 (Fla. 1986)("Frankly we find Murray's purported lack of intent to shoot the victim inconsistent with his admitted intent to kidnap, rob and sexually batter her").

Finally, Defendant's rumination, (B. 69), about transferred intent must be rejected as the red herring which it is. Even assuming, *arguendo,* that Defendant did not personally have the intent to kill Officer Bauer, he was a full and complete participant in the robbery. The forensic evidence conclusively showed that Gonzalez and Franqui shot and killed the officer in the furtherance of that robbery. The evidence further showed that no shots were fired by Bauer. These factors clearly support a finding of premeditation on the part of Franqui and Gonzalez. *Spencer; Crump; Young; Bello; Sochor; Provenzano.* As such Defendant is guilty

of premeditated first-degree murder; not because of "transferred intent," but because as a fully involved principal he is liable for the acts of his codefendant. *Foxworth v. State, 267 So.* 2d 647,650 (Fla. 1972) (conviction of premeditated murder upheld where evidence showed that either defendant or codefendant actually killed victim); *Hall v. State, 403 So.* 2d 1319, 1320 (Fla. *198 1*)(same); *Hall v. State,* 403 So. 2d 132 1, 1323 (Fla. 198 1)(same); *James v. State,* 453 So. 2d 786, 792 (Fla. 1984), *sentence rev. on othergrounds,* 615 So. 2d 668 (Fla. 1993)(where defendant was present and actively participated in events each defendant responsible for the acts of the other). For the foregoing reasons, Defendant's conviction of first-degree murder should be affirmed.[15]

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[15] Defendant's suggestion that *Tison* and *Enmund* bar his death sentence is without merit, as discussed at Point XII, *infra.*

Vi.
DEFENDANT'S CLAIMS REGARDING THE MURDER VICTIM'S FINAL WORDS ARE WITHOUT MERIT.

Defendant's sixth issue is that the testimony of the surviving robbery victims as to Officer Bauer's final words was reversible error. One of these statements was not preserved, and both were properly admitted. Finally, any error would be harmless beyond a reasonable doubt.

Defendant complains that the testimony by Hadley and Chin-Watson regarding Officer Bauer's statements after he was shot should not have been admitted. However, Defendant did not object to Hadley's testimony in that regard, and as such may not now raise the issue. (T. *945). Ferguson v. State,* 417 So. 2d 639, 641 (Fla. 1984).

Furthermore, neither this testimony, nor Chin's, was improper. Brief humanizing comments are permissible. *Stein v. State,* 632 So. 2d 1361, 1367 (Fla. 1994). The comments here were an integral part of the testimony which described the shooting of Officer Bauer, and which showed that even after he was shot, he continued to perform his lawful duties. That he was exercising these duties when he was killed is an element under § 775.0823, Fla. Stat., under which Defendant was charged. (R. 1). The testimony was thus also properly admitted as part of the res gestae of the crime. *Mills v. Dugger, 574 So.* 2d *63* (Fla. *1990); Garcia v. State, 492 So.* 2d 360, *365* (Fla. *1986); Knight v. State, 338*

So. 2d 201 (Fla. 1976), *relief granted on* **othergrounds,** *863* F.2d 705 (1 1 th Cir. 1988).

Even if the comments or testimony were improper, any error, individually or cumulatively, was harmless beyond a reasonable doubt. Aside from the instances identified in Defendant's brief, there were no other personal allusions to Officer Bauer. The remainder of the 1 1 00-plus pages devoted to the guilt-phase trial were limited to the circumstances of the crime. Two comments in eleven hundred pages hardly suggests an overwhelming appeal to sympathy. The State's closing argument, which covers twenty-nine transcript pages, was overwhelmingly devoted to a discussion of the evidence as it applied to the charged crimes. (T. 2 189-2220). Given the overwhelming evidence, including Defendant's confession, as well as eyewitness, fingerprint, and ballistic evidence tying the defendants to this crime, it cannot reasonably be argued that this brief testimony could have affected the jury's verdict. *Davis v. State,* 604 So. 2d 794 (Fla. 1992); *Sireci v. State, 587* So. 2d 450 (Fla.), *cert. denied, ___ U.S. ___,* 1 *12 S.* Ct. *1500,* 1 *I7* L. Ed. 2d *639* (1991); *Stein; State v. DiGuilio,* 491 So. 2d 1129 (Fia. 1986).

VII.
DEFENDANT HAS FAILED TO DEMONSTRATE THAT ANY DOCUMENTARY EVIDENCE REGARDING HIS CODEFENDANTS WAS IMPROPERLY ADMITTED AGAINST HIM.

In his seventh claim, Defendant, without cite to record or legal authority, avers that "every other piece of documentary evidence pertaining to" the codefendants was improperly admitted against him. (B. 7 1). This claim is so vaguely constituted as to fail to state a basis for appellate relief, and, in any event appears to be without merit.

In support of this claim, Defendant cites only trial counsel's "drumbeat of objections." (B. 71). He fails to offer a record cite or identify any specific piece of evidence which he alleges was improperly admitted. As such he has failed to present a basis for relief, and this claim should be denied. *Kight* v. *Dugger,* 574 So. 2d 1046, 1073 (Fla. 1990)(issues raised solely by purported reference to arguments below deemed waived); *Duest v. Dugger, 555 So.* 2d 846, 852 (Fla. 1990)(same).

Defendant alludes to alleged hearsay violations, but he fails to identify the evidence to which he refers; as such the State is at a loss to respond. He only refers vaguely to "sketches," "Miranda cards," and "fingerprint cards." As for any sketches and Miranda cards, presumably he refers to items integral to the codefendants' statements, which issue has been addressed

above." Further, in that any documentary evidence in that regard was cumulative to the testimony given, its admission would have been harmless if error at all.

Furthermore, any non-confession-related evidence regarding the codefendants was plainly admissible against Defendant. The evidence's admissibility is founded in the fact that the defendants were charged and tried as principals. It is well-settled that evidence of guilt as to one principal is admissible against his coprincipals, *Jimenez v. State,* 158 Fla. 719, 30 So. 2d 292, 297 (1947); § 777.01 1, Fla. Stat.

Based upon the foregoing, Defendant's seventh claim should be rejected.

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[16] The issue of the codefendants' statements is addressed at Point *I, supra.* Any other "sketches" would have been admitted through the testimony of those preparing them, and as such would not have been hearsay.

VIII.
THE STATE'S PRESENTATION OF DR. MUTTER'S TESTIMONY TO THE COURT WAS NOT IMPROPER.

Defendant asserts, as his eighth contention, that error occurred when Dr. Mutter testified before the court, when his testimony had not been presented to the jury. The procedure followed was proper.

It is well-settled that the State is permitted to present, as is the defense, additional evidence after the jury has given its recommendation, and that the court is permitted to consider such evidence. That the jury has recommended life does not alter this precept. *Cochran v. State,* 547 So. 2d 928, 93 1 (Fla. 1989)(trial court may consider evidence not presented to jury); *Spaziano v. State,* 433 So. 2d 503, 5 1 1 (Fla. 1983) (same); *Porter v. State,* 429 So. 2d 293 (Fla. 1983)(same). This contention must be rejected.

IX.
DEFENDANT WAS NOT DENIED HIS REQUEST FOR EXPERT ASSISTANCE.

Defendant avers at Point IX that he was denied the assistance of a psychiatric expert. This contention wholly misstates the record. Defendant in fact received the assistance of three qualified experts. This claim should be rejected.

The record reflects that prior to the penalty phase proceeding before the jury, Defendant was examined by three appointed experts, Drs. Herrera, Lourenco, and Marina. (R. 796). Herrera and Lourenco testified at that proceeding on September 2 1, 1994. (T. 2630-76, 2694-2757). When the State indicated, on September 30, 1994, that it would call Dr. Mutter to testify in the post-recommendation hearing before the judge, [17] the defense moved for the appointment of an additional expert. (T. 3 129). The court, noting that the defense already had the services of several experts, and that Dr. Mutter had been listed as a witness for the penalty phase by the State since well before the jury sentencing phase, and upon the State's proffer that Dr. Mutter's testimony would be virtually the same as that presented at the sentencing in the Hialeah case a year earlier, found that the request was untimely and excessive. (T. 3 13-34). This ruling was proper.

This court applies an abuse of discretion standard when reviewing the trial court's

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[17] This was proper as was discussed at Point VIII, *supra*.

refusal to provide funds for the appointment of experts for indigent defendants. *Martin v. State, 455* So. 2d 370, 372 (Fla. *1984); Quince v. State, 477 So.* 2d 535, 537, (Fla. 1985), *cert. denied, 475* U.S. 1 132, 104 S. CT. 1662, 90 L. Ed. 2d 204 (1986). The courts which have considered the question generally apply a two-part test in determining whether a defendant was improperly deprived of expert assistance: (1) whether the defendant made a particularized showing of need, and (2) that denial of such ass/stance would result in a fundamentally unfair trial. *See Moore v. Kemp, 809* F. 2d 702, 7 10-7 12 (1 1 th Cir.), cert. denied, 481 U.S. 1054, 107 *S.* Ct. *2 192, 95* L. Ed. 2d *847* (1987); *Ding/e v. State, 654* So. 2d 164, 166 (Fla. 3d DCA *1995); Cade v. State, 658 So.* 2d 550 (Fla. 5th DCA 1995) (on rehearing).

As the trial court cogently noted, Dr. Mutter's testimony was essentially unchanged from that given in Defendant's previous trial and Defendant had already secured the assistance of three experts, two of whom had testified favorably for him. As such he failed to demonstrate a particularized need for the appointment of an additional expert. Therefore, the request was properly denied. *Moore,* at 7 12 (*Ake* and *Caldwell*[18] hold that defendant must show more than a mere possibility of benefit from a requested expert); *Caldwell, 472* U.S. at 323 n. 1 ("Given that petitioner offered little more than undeveloped assertions that the

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18 *Ake v.Oklahoma, 470* U.S. 74, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985); *Caldwell v. Mississippi, 472* U.S. 320, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985).

requested assistance would be beneficial, we find no deprivation of due process in the trial judge's decision"); *Baxter v. Thomas,* 45 F.3d 150 1, 15 1 1 (11 th Cir. 1995)(no error where defendant did not show "substantial basis" for appointment of psychiatric expert); cf. *Dingle,* at 166 (showing of need sufficient where "defendant eloquently argued" that the State's evidence the expert would have attacked "was pivotal to a determination of guilt"). For the same reasons, Defendant failed to explain how his trial would have been rendered fundamentally unfair without the appointment of yet a fourth expert. Moore, at 712 ("due process does not require the government to automatically provide indigent defendants with expert assistance on demand;" expert need be appointed only where failure to do so would render trial fundamentally unfair). The trial court did not abuse its discretion.

Nevertheless, Defendant was again examined by Dr. Lourenco, a psychiatrist, on September 30, 1994. Dr. Lourenco was then called in rebuttal to Dr. Mutter, and testified for Defendant at the hearing before the court on October 3, 1994. (R. 8 15-54). As such even if the court's ruling of September 30 were error, Defendant has failed to show that he was actually denied any right to assistance of a mental health expert, and is not entitled to reversal on those grounds. *See Morgan v. State,* 639 So. 2d 4, 12 (Fla. 1994)(error in denial of appointment of expert harmless where it would not have affected the outcome of the proceedings). Defendant's Claim IX must be rejected.

X.

THE TRIAL COURT PROPERLY OVERRODE THE JURY'S RECOMMENDATION WHERE THERE WAS NO REASONABLE BASIS UPON WHICH TO IMPOSE A LIFE SENTENCE IN VIEW OF THE AGGRAVATING AND MITIGATING CIRCUMSTANCES PROVED AT TRIAL.

Defendant's tenth contention is that the trial court erred in overriding the jury's life recommendation. However, although the trial court gave the jury's recommendation great weight, it concluded that the facts of this case suggesting a sentence of death were so clear that virtually no reasonable person could differ, and thus sentenced Defendant to death. An examination of the record reveals that he trial court's conclusion was correct, and Defendant's sentence should be affirmed.

A. THE TRIAL COURT PROPERLY FOUND THE PROFFERED MENTAL HEALTH MITIGATION NOT TO HAVE BEEN ESTABLISHED

Defendant's thesis is that the trial court erred in finding that the proffered mental health mitigation had not been established. However, a trial court is only obligated to find, as mitigating circumstances, those proposed factors which are mitigating in nature and have been reasonably established by the greater weight of the evidence. *Campbell v. State, 571 So.* 2d 415, 419 (Fla. 1990). In addition:

> [W]hen a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved. A trial court may reject a defendant's claim that a mitigating circumstance has been proved, however, provided that the record contains "competent substantial evidence to support the trial court's rejection of these mitigating circumstances."

Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1992). Opinion testimony of experts comes with a further caveat, as it is not necessarily binding even if uncontroverted. *Walls v. State,* 641 So. 2d 38 1, 390-91 (Fla. 1994) ("Certain kinds of opinion testimony . . . are not necessarily binding even if uncontroverted. Opinion testimony gains its greatest force to the degree it is supported by the facts at hand, and its weight diminishes to the degree such support is lacking. A debatable link between fact and opinion relevant to a mitigating factor usually means, at most, that a question exists for judge and jury to resolve"). In view of the fact that Dr. Mutter specifically testified that Defendant's mental impairments, which even the defense experts had characterized as "mild," in no way contributed to Defendant's actions, the trial court properly found the proposed mitigating circumstances not to exist. Furthermore, even absent Dr. Mutter's testimony, the testimony of Defendant's experts simply was not credible in light of Defendant's actions and the (ever-changing) testimony of the defense lay witnesses.

Defendant urged the court to find the following statutory mental health-related mitigators:[19]

> (1) That Defendant acted under extreme duress or under the substantial domination of another;

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[19] Defendant did not claim below that Defendant was under the influence of extreme mental or emotional disturbance at the time of the murder. (R. 760). As such he may not raise it now. *Hodges v. State,* 595 So. 2d 935 (Fla. 1992). Nor does Defendant now challenge the rejection of the remaining mitigation factors set forth in § 92 1.14 1(6), Fla. stat.

(2) That Defendant's capacity to appreciate the criminality of his conduct or to conform to the requirements of the law was substantially impaired.

(R. 759-65). Defendant also asserted the existence, in summary, of the following nonstatutory mental-health mitigation:

(1) That Defendant had dull normal intelligence and organic brain damage;

(2) That Defendant was abused and battered as a child;

(R. 765-70).[20] As will be shown, there was no credible evidence in support of Defendant's proffered mental-health mitigation, and the trial court properly rejected it.

1. Extreme duress or under the substantial domination of another

Although Dr. Lourenco repeatedly asserted that Defendant would be more likely to be easily led, the only concrete statement in support of this aggravator offered by him was that Franqui had told Defendant he would be able to buy things he wanted with the money. (R. 831). While such might constitute the offering of incentive,[21] it hardly constitutes "extreme duress" or "substantial domination." Further, as the trial court found, (R. 761-62), nothing in the record suggested that Defendant was anything other than a willing participant in the crime. The trial court rejected the notion that the mitigator was supported by Defendant's

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[20] Defendant has not challenged the court's rejection of the proffered non-mental health mitigation.

[21] Desire for unearned money is, of course, the usual, if not universal, motivation for armed robbery.

moderately limited intelligence, noting that none of the defendants were particularly bright, and that none appeared to have coerced the others. The trial court further found that it was wholly unbelievable that Defendant could have been manipulated "in the manner suggested on so many occasions," (R. 76 1): Defendant and one or more of his cohorts stole a van and attempted to rob Craig VanNest; Defendant and others stole a car and attempted to rob the guard at the Bird Road bank, during which Defendant confronted and shot at the victim; Defendant and his friends stole two Suburbans and attempted to rob and did kill Raul Lopez in Hialeah; and finally, Defendant & Co. stole two more cars and robbed the Kislak Bank and killed Officer Bauer, during which Defendant ran forward and got the money tray while Franqui (who is accused of being Defendant's puppeteer) and Gonzalez were busy shooting Bauer, and after which Defendant disposed of the guns used in several of the crimes in the Miami River. None of the foregoing suggests that Defendant was being manipulated or was under duress:

> All of these acts were carefully planned and executed. In each case the defendant and his accomplices went after big money targets. Their crimes were bold, dangerous and always extremely violent. This defendant was never on the periphery but rather at the center of the activity.

(R. 762). In view of the foregoing, the trial court properly rejected this factor. *Walls; Nibert.*

2. ***Lack*** *capacity to appreciate the criminality of conduct or substantial impairment of ability to conform behavior to the requirements of the law*

The trial court rejected the opinion of Lourenco and Herrera that this factor existed,

finding that their conclusions were not supported by Defendant's actions:

> The characteristics the experts described, impulsivity, lack of self-control and mood swings, suggests that such an individual might be prone to behave in irrational, spontaneous conduct. It would not be illogical to conclude that such a person might even be prone to inexplicable acts of violence, bursts of anger or even uncontrolled rage. But the defendant's actions were not of this type. Quite to the contrary this defendant's actions were always well planned and goal oriented. At the republic National Bank the defendant and his accomplices surveiled that bank and the activities of the security guard before attempting to commit the robbery. On December 6, 1991 the attempted robbery of Danilo Cabanas Jr. and Sr. was carefully planned for months before the plan was executed. In this case the defendants got their plan from Fernando Fernandez and visited the bank before the robbery to better prepare for the crime. On January 14, 1992 the defendant and his accomplices obviously planned the robbery of Craig VanNest as evidenced by the fact that the third co-defendant (not a defendant in this case) flashed a police badge in order to get VanNest to stop his car. Each case is characterized by two factors, careful planning and the fact that Leonardo Franqui and Pablo San Martin were the common denominator. In the Republic Bank incident the defendant was the passenger in his vehicle and Franqui was in another car, thus it is reasonable to assume that another, unidentified, defendant was driving the car in which this defendant was riding. In the Cabanas' attempted robbery Pablo Abreu was the third defendant. In this case it was Ricardo Gonzalez, Fernando Fernandez and Pablo Abreu. Finally in the robbery and kidnapping of Craig Van Nest there was also a third party identified in the penalty proceeding as the man who flashed the police badge at VanNest in an effort to make him stop his car. These activities are not the product of impulsivity or mild mood swings. They are the product of connivance of unscrupulous, ruthless and evil men. Men interested only in money and totally uncaring of who they destroyed to get it. Men such as this defendant.

(R. 763-64). In addition to Defendant's objective conduct, this factor was further undermined by the sheer unbelievability and inconsistency of the expert testimony. Dr.

Lourenco opined that Defendant did not understand that what he did was wrong until after he found religion in jail.[22] (R. 825-26). However, earlier (before the unsuccessful outcome of the Hialeah sentencing) Defendant had convinced Drs. Mutter *and* Herrera that he knew right from wrong and the consequences of his actions, with regard to the Bauer murder as well as the other crimes. (T. 2745-44, 275657, R. 792-95).

Likewise, Dr. Lourenco opined that Defendant did not realize he was involved in a robbery at the Kislak Bank, and that Defendant "was surprised when he found out that there was people hurt or killed," and Defendant "did not know what was going on," or that "he should run away, disappear instead of keeping in the place of the crime." (R. 829). Of course, Lourenco conveniently overlooked that Defendant was one of three people who, a few weeks earlier, had loosed a hail of bullets without warning in the Hialeah case, and that he was the sole shooter in the Bird Road case. He further ignored that during the robbery that Defendant allegedly did not realize was happening, Defendant ran, without any prompting, into a gun battle and nabbed a money tray containing $15,000. And finally, he ignores the fact that in all four cases, once Defendant had what he wanted or was thwarted, he successfully fled the scene, and that Defendant was the one who disposed of the murder weapons. Defendant's expert testimony was simply not credible in the harsh light of reality. Dr. Mutter's, on the other hand, was wholly consistent with Defendant's repeated acts of cold, carefully planned,

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[22] Even the religious basis of Defendant's allegedly new-found morality is suspect. Lourenco testified that Defendant was wholly unfamiliar with religion before he was incarcerated. (R. 826). His mother, on the other hand, testified that she taught Defendant about God when he was a child, in defiance of Castro's ban on religion. (T. 2795).

violence. The trial court properly rejected this mitigator. *Walls; Nibert; Cook v. State, 58 1* So. 2d 141, 143-44 (Fla. 199 1)(proper rejection of mental mitigating circumstances in light of conflicting and contradictory evidence).

3. Dull normal intelligence and organic brain damage

For the reasons enunciated above, it was quite apparent that although Defendant was no genius, any Intellectual deficit or brain lesions he may have suffered clearly did not contribute to his actions in this case or the others. The trial court properly rejected this mitigator. ***Walls; Nibert; Cook,***

4. Abused and battered childhood

This proposed mitigator was simply not supported by any believable testimony. Although Defendant's mother and sister testified that Defendant was chained to a table by his father as a child, this alleged abuse was denied by all family members and Defendant himself until after the death sentence was imposed in the Hialeah case.[23] Prior to that time all reported on Defendant's good childhood. (R. 809-8 14). As such this alleged mitigation was properly rejected as wlthout credible evidentiary support. ***Walls; Nibert; Cook.***

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[23] The jury was not informed of the prior sentencing proceeding or its outcome.

B. THE TRIAL COURT PROPERLY REJECTED THE JURY'S LIFE RECOMMENDATION

The trial court found the following aggravating factors, which Defendant does not now challenge: (1) prior convictions for felonies involving violence (the armed kidnapping and armed robbery of Craig VanNest, the attempted robbery with a firearm of the Republic Bank on Bird Road, the aggravated assault of Pedro Santos, the first degree murder of Raul Lopez, the attempted first degree murder of Danilo Cabanas, Sr., the attempted first degree murder of Danilo Cabanas, Jr., the attempted robbery with a firearm of the Cabanases, the armed robbery of the Kislak Bank and Michelle Chin, and the aggravated assault of LaSonya Hadley); (2) murder committed during the course of a robbery, merged with the motive of pecuniary gain; and (3) murder of a law enforcement officer, merged with witness elimination. The court found no statutory mitigating circumstances, and minimal nonstatutory mitigation: Defendant had turned to religion for peace of mind and had had little parental guidance. As discussed above, the other mitigation proffered by the defense was simply beyond belief.[24] When the foregoing is weighed, it is clear that the trial court properly refused to follow the jury's recommendation. *See Washington v. State,* 653 So. 2d 362, 366 (Fla. 1994)(trial court properly overrode life recommendation where there were four valid aggravators, no statutory mitigators, "inconsequential" nonstatutory mitigation, and expert and family testimony was contradicted by the evidence of defendant's behavior); *Garcia v. State, 644*

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[24] Notably, when presented with virtually the same penalty-phase evidence, although without the additional aggravation of a remarkably similar prior robbery/murder, the jury in the Hialeah case, by a vote of 9 to 3, recommended that Defendant be sentenced to death. (No. 83,611, R. 1038).

So. 2d 59, 63-64 (Fla. 1994)(override proper where the proffered mitigation was unsupported and defendant was given death recommendation by jury when presented with same evidence of aggravation and mitigation with regard to another victim); *Robinson v. State,* 6 10 So. 2d 1288,1292 (Fla. 1992)(override proper where there was substantial aggravation and minimal mitigation; proffered mitigation of low intelligence and deprived background properly rejected where there was no evidence same was related to crimes); *Marshall v. State,* 604 So. 2d 799, 806 (Fla. 1992) (override proper where minimal mitigation was outweighed by substantial aggravation, including history of violent crime); *Zeigler v. State, 580 So.* 2d 12 7, 13 1 (Fla. 199 1) (override not improper simply because "a defendant can point to some evidence established in mitigation;" proper where substantial aggravation outweighed minimal mitigation); *Thompson v. State, 5 5 3* So. 2d 15 3 (Fla. 1889) (mental health expert testimony properly rejected where contradicted by evidence of Defendant's actions; override proper where evidence established multiple aggravating circumstances and minimal nonstatutory mitigation); *Torres-Arboleda v. State,* 524 So. 2d 403 (Fla. 1988)(expert testimony properly rejected where not square with evidence; override proper where mitigation not outweigh substantial aggravation including prior murder conviction).

XI.

FLORIDA'S DEATH PENALTY STATUTE IS CONSTITUTIONAL.

Defendant argues that Florida's death penalty is arbitrarily and discriminatorily applied on the basis of the race, sex and economic status of the victim as well as the offender. This claim has never been presented in the trial court; no facts, figures or studies were ever adduced, and none are offered now. As such, this claim is unpreserved for appellate review. *See, e.g., Taylor v. State,* 60 1 So. 2d 540 (Fla. 1992) (sentencing errors requiring resolution of factual matters not contained in record cannot generally be raised for first time on appeal). The application of that principle in the instant context is implicit in *Foster v. State,* 6 14 So. 2d 455, 463-65 (Fla. 1992), where this court held that the trial court properly refused to conduct an evidentiary hearing on a similar claim, where the defendant had presented studies and figures which this court concluded did not make out a prima facie case. Furthermore, similar claims have routinely been denied on the merits. *See McClesky v. Kemp, 48* 1 U.S. *279, 107 S.* Ct. *1756, 95* L. Ed. 2d *262* (1987); *Roberts v. State, 5* 10 So. 2d 885, 895 (Fla. *1987); King* v. *State,* 5 14 So. 2d 354, 359 (Fla. *1987); Cochran v. State, 547 So.* 2d 928, 930 (Fla. 1989).

Defendant also generally argues that the death penalty constitutes cruel and unusual punishment under any circumstances. This issue is also barred, as it was not raised below. Furthermore, it has routinely been rejected. See, *e.g., Thompson v. State, 6 19 So.* 2d 26 1,

267 (Fla. *1993); Lightbourne v. State, 438 So.* 2d *380* (Fla. *1983); Raulerson v. State, 358 So.* 2d *826* (Fla. *1978); Proffit v. Florida, 428* U.S. 242, 98 S. Ct. 2980, 49 L. Ed. 2d 9 13 (1976). The same cases, and numerous others, obviously refute the proposition that the death penalty is morally wrong. This claim must be rejected.

XII.

DEFENDANT WAS PROPERLY SENTENCED TO DEATH WHERE THE TRIAL COURT CORRECTLY DETERMINED THAT DEFENDANT INTENDED LETHAL FORCE TO BE EMPLOYED, WAS A MAJOR PARTICIPANT IN THE ROBBERY AND HIS MENTAL STATE WAS, AT THE VERY LEAST, ONE OF RECKLESS INDIFFERENCE FOR HUMAN LIFE, AND HIS SENTENCE IS PROPORTIONAL.

As his final contention, Defendant claims that his sentence is disproportionate. The term "proportionality," as used in death-penalty jurisprudence, refers to two distinct concepts. *Pulley v. Harris, 465* U.S. 37, 43, 104 S. Ct. 871, 79 L. Ed. 2d 29 (1984). The first, as the meaning is understood in traditional Eighth Amendment analysis, is concerned with whether the punishment is commensurate with the crime. *Id.; Enmund v. Florida, 458* U.S. 782, 787, 102 S. Ct. 3368, 73 L. Ed. 2d (1982). The second type of "proportionality" addresses whether the sentence is disproportionate to the punishment imposed on others convicted of the same crime. *Pulley,* 465 US. at 43. Defendant claims that his sentence is inappropriate in both senses. Defendant first asserts that he should not have been sentenced to death because "he killed nobody, intended to kill nobody, and fired no gun." (B. 79). Unfortunately for Defendant, that is not the test. The trial court, in a lengthy analysis, reviewed the law regarding the application of the death penalty to "non-shooters" and correctly concluded that Defendant's sentence was appropriate. Defendant further asserts that his sentence is disproportional when compared to the sentences of other similarly-situated defendants and to that of his codefendant Abreu, who received a life sentence. Both of these latter contentions are also without merit.

A. DEFENDANT'S ACTIONS AND MENTAL STATE WERE SUFFICIENT TO SUPPORT IMPOSITION OF THE DEATH PENALTY

Pursuant to this court's dictates, the trial court analyzed whether death was the appropriate penalty in this case, in that Defendant was not the triggerman. Upon consideration of all the circumstances, the court concluded that it was:

> In *Edmund v. Florida,* 102 S.Ct. 3368 (1982) the United States Supreme Court held that a sentence of death violated the Eighth Amendment of the United States Constitution "... in the absence of proof that the defendant killed or attempted to kill." In *Jackson v. State,* SO2 So. 2d 409 (Fla. 1986) the Supreme Court of Florida held that
>
> > In order to ensure a defendant's right to an *Enmund* factual finding and to facilitate appellate review of this issue, we direct the trial courts of this state in appropriate cases to utilize the following procedure. The jury must be instructed before its penalty phase deliberations that in order to recommend a sentence of death the jury must first find that the defendant killed or attempted to kill or intended that a killing take place or that lethal force be employed... *trial court judges are directed when sentencing such a defendant to death to make an explicit written finding that the defendant killed or attempted to kill or in tended that a killing take place or that lethal force be employed, including the factual basis for the finding.* (Emphasis added).
>
> In *Tyson* [sic] *v. Arizona* 107 S.Ct. 1676 (1987) the United States Supreme Court recognized that a majority of American jurisdictions which provide for the death penalty "specially authorize the death penalty in a felony-murder case where, though the defendant's mental state fell short of intent to kill, the defendant was the major actor in a felony in which he knew death was highly likely to occur" and that "substantial

> participation in a violent felony under circumstances likely to result in the loss of innocent human life may justify the death penalty even absent an 'intent to kill.'" The court concluded that "*major participation in the felony committed combined with reckless indifference to human life, is sufficient to satisfy the Enmund culpability requirement.*" (Emphasis added). Thus in order to justify a death sentence on this defendant the court must find that the defendant killed or attempted to kill or intended that a killing take place or intended that lethal force be employed or the defendant was a major participant in a felony that resulted in the victim's death and his mental state was one of reckless indifference.
>
> The facts of this case clearly establish that, at the very least, the defendant intended that lethal force be employed and that he was a major participant in a felony that resulted in Officer Bauer's death and his mental state was one of reckless indifference. The defendant knew the intended target. He knew that the target was not an easy mark; he knew that there would be a police officer or armed guard protecting the tellers; he knew or should have known that the officer would not just allow the robbery to happen; he knew that his accomplices were armed and he knew that his accomplices, like himself were extremely violent men. Additionally the defendant had already attempted a bank robbery where he aimed a pistol at a security guard and opened fire and, less than thirty days earlier, had attempted an armed robbery during which a man was murdered.
>
> Based on the facts set forth above as well as the facts elicited during the trial and the penalty proceeding this court finds that this defendant intended that lethal force be used during the commission of the robbery of the Kislak National Bank on January 3, 1992; that he was a major participant in the felony that led to the death of Stephen Bauer and that his mental state was one of reckless indifference.

(R. 770-72)(added emphasis and ellipses the trial court's). The trial court correctly enunciated the standard to be applied. See *Enmund v. Florida, 458* U.S. 782, 801, 102 S. Ct. 3368, 73 L. Ed. 2d (1982)(imposition of death penalty on defendant who did not kill,

attempt to kill or intend that killing take place disproportional under Eighth Amendment); *Tison v. Arizona*, 481 U.S. 137, 107 S. Ct. 1676, 95 L. Ed. 2d 127 (1987)(defendants who did not kill or intend to kill properly sentenced to death where they exhibited reckless indifference to human life and were major participants in the underlying felony). *Cabana v. Bullock*, 474 U.S. 376, 390, 104 S. Ct. 689, 88 L. Ed. 2d 704 (1986)(Eighth Amendment requires that death sentenced defendant have actually killed, attempted to kill, or intended that lethal force be used in the commission of a felony). Under the evidence cited, the accuracy and existence of which Defendant in no way challenges, the court justly concluded that the death penalty would not be inappropriate in this case. Defendant was a major participant, running forward to grab the money after the officer had been immobilized. Further, there was ample evidence of his indifference to human life. Although he was not the triggerman here, he made no effort whatsoever to stop or prevent his accomplices from killing. Rather, the evidence suggests that the shooting was an integral part of the robbery: the tellers testified that the gunshots were the first indication that they were being robbed. Further, within a two-month period previous to the killing of Officer Bauer, Defendant *did* shoot, on two separate occasions, at his victims. Indeed, the evidence presented regarding the Hialeah case showed that, just like his codefendants in this case, Defendant began shooting at the Cabanases immediately upon exiting his vehicle, without so much as a "stick 'em up." As such, he was properly sentenced to death. *Tison*; *DuBoise v. State, 520 So.* 2d 260, 266 (Fla. 1988)(death sentence proper for non-shooter where defendant was a major participant in the felony, made no effort to prevent companions from killing, and totality of circumstances

reflected his indifference to human life); *Van Poyck v. State, 564 So.* 2d 1066, 1070-71 (Fla. 1990)(death sentence proportional where "no question" that defendant had "major role" and "knew lethal force could be used").

B. DEFENDANT'S SENTENCE IS PROPORTIONAL.

Defendant has further asserted that his sentence is disproportionate, both as to similarly situated defendants, and as to codefendant Abreu. Neither of these contentions is sustainable. "Proportionality review compares the sentence of death with other cases in which a sentence of death was approved or disapproved." *Palmes v. Wainwright, 460 So.* 2d 362, 362 (Fla. 1984). The Court must "consider the totality of circumstances in a case, and compare it with other capital cases. It is not a comparison between the number of aggravating and mitigating circumstances." *Porter v. State,* 564 So. 2d 1060, 1064 (Fla. 1990), *cert. denied,* ___ U.S. -- 1 1 1 S.Ct. 1024, 1 12 L.Ed. 2d 1 106 (199 1). "Absent demonstrable legal error, this Court accepts those aggravating factors and mitigating circumstances found by the trial court as the basis for proportionality review." *State v. Henry,* 456 So. 2d 466, 469 (Fla. 1984).

The trial court found the following aggravating factors: (1) prior convictions for felonies involving violence; (2) murder committed during the course of a robbery, merged with the motive of pecuniary gain; and (3) murder of a law enforcement officer, merged with witness elimination. The court found no statutory mitigating circumstances, and minimal nonstatutory

mitigation: Defendant had turned to religion for peace of mind and had had little parental guidance.

This court has affirmed the death sentences in numerous cases where the murder was committed during the course of a robbery. *See, e.g., Smith v. State,* 64 1 So. 2d 13 19 (Fla. *1994); Heath v. State,* 648 So. 2d 660 (Fla. *1994); Carter v. State,* 576 So. 2d 129 1 (Fla. 1989); *Cook v. State,* 581 So. 2d 141 (Fla. 199 1); *Lowe v. State,* 650 So. 2d 969 (Fla. *1994); see also Freeman v. State,* 563 So. 2d 73 (Fla. 1990) (murder during course of burglary/for pecuniary gain); *Wickham v. State,* 593 So. 2d 19 1 (Fla. 1992) (murder committed during an armed robbery/ambush of a vehicle alongside a road).

In *Smith,* the defendant received the death sentence for the killing of a cab driver. *Id.,* at 13 19. The trial court found the existence of two aggravating circumstances: (1) the murder was committed during an attempted robbery; and (2) the defendant had a previous convlctlon for a violent felony. If anything, the aggravation in *Smith* is less than here, where the additional factor of killing a policeman/witness elimination was found. In *Smith,* the court also found one statutory mitigating circumstance -- no significant history of criminal activity -- and several nonstatutory mitigating circumstances relating to Smith's background, character and record. This court rejected Smith's claim of disproportionality. Here, with considerably more aggravation and less mitigation -- as there were no statutory factors found -- and a

basically similar situation of a murder during armed robbery, the case is more compelling for the imposition of the death sentence.

In *Heath, the* two aggravating circumstances were the commission of the murder during the course of an armed robbery, and the existence of a prior conviction for second-degree murder. *As* in *Smith,* the murder was not accompanied by the additional aggravating factor. The court found substantial mitigating factors, including the influence of extreme mental or emotional disturbance, based upon consumption of alcohol and marijuana, as well as minimal nonstatutory mitigation. In *Heath,* as here, although the defendant was not determined to be the actual shooter, he was at least a co-equal participant in the underlying crime. This court determined that the death sentence was appropriate.

In *Lowe,* the defendant was convicted of the murder of a convenience store clerk during the course of an attempted armed robbery. Two aggravating factors existed: (1) prior conviction of a violent felony; and (2) murder committed during the attempted robbery. Once again, the sentence was affirmed in a case virtually identical to the instant one, minus Defendant's additional witness elimination/law enforcement officer factor. The *Lowe* trial judge's sentencing order was somewhat ambiguous as to whether he was rejecting all of the mitigation or whether he was treating it as established but outweighed by the aggravation. This court, on appeal, assumed that the various mitigating factors were established (defendant 20 years old at time of crime; defendant functions well in controlled environment; defendant a

responsible employee; family background; participation in Bible studies) and nevertheless proceeded to find that the death sentence was warranted.

Other cases similarly support the conclusion that the death sentence was proper in the instant case. *Watts v. State,* 593 So. 2d 198 (Fla. 1992)(aggravators: prior violent felonies; murder during course of sexual battery; murder committed for pecuniary gain; mitigation: low IQ reduced judgmental abilities; defendant 22 at time of offense); *Freeman v. State, 563* So. 2d 73 (Fla. 1990)(aggravators: prior violent felony; murder during course of burglary/committed for pecuniary gain; mitigation: low intelligence; abuse by stepfather; artistic ability; enjoyed playing with children); *Cook,* at 141 (aggravators: murder during course of robbery; prior violent felony; mitigation: no significant history of criminal activity and minor nonstatutory mitigation). In view of the foregoing, the imposition of the death sentence here is clearly proportionate with death sentences approved in other cases.

Finally, Defendant's claim regarding the sentence of codefendant Abreu is also without merit. The primary inquiry that this court undertakes in conducting proportionality review is not the comparison of codefendants' sentences, but a comparison between the defendant's sentence and those of others whose death sentences have been upheld or reversed. See *Garcia* v. *State,* 492 So. 2d 360, 368 (Fla. 1986):

> Appellant's argument misapprehends the nature of our proportionality review. Our proportionality review is a matter of state law. *Pulley v. Harris,* 465 U.S. 37, 104 S. Ct. 871, 79 L.

> Ed. 2d 29 (1984); State *v.* Henry 456 So. 2d 444 (Fla. 1984). Such review compares the sentence of death to the cases in which we have approved or disapproved a sentence of death. It has not thus far been extended to cases where the death penalty was not imposed at the trial level. *Proffitt v. Florida, 428* U.S. 242, 259, n. 16, 96 S. Ct. 2960 n. 16, 49 L. Ed. 2d 9 13 (1976); *Palmes v. Wainwright, 460 So.* 2d 362 (Fla. *1984); Brown v. Wainwright, 392 So.* 2d 1327 (Fla.) cert. denied, 454 U.S. 1000, 102 S. Ct. 542, 70 L. Ed. 2d 407 (1981).

Furthermore, as the trial court found in the sentencing order, (R. 766), although like Defendant, Abreu also did not shoot Officer Bauer, Abreu's role was substantially less than Defendant's While Defendant was actually at the scene of the robbery and murder, and was the one who ran up during the fusillade and snatched the cash drawer from the prostrate teller, Abreu was parked several blocks away in the getaway vehicle. Further, Abreu pled guilty and agreed to be a witness for the State in both this and the Hialeah cases, in exchange for the life sentences he received in both cases.[25] Under such circumstances, this court has repeatedly approved the imposition of the death penalty where a codefendant received life. *Cardona v. State,* 641 So. 2d 36 1, 365 (Fla. 1994)(challenge to proportionality of death sentence in face of codefendant's life sentence rejected where defendant more culpable); *Steinhurst v. Singletary,* 638 So. 2d 33, 35 (Fla. 1994)(same); *Hannon v. State, 638 So.* 2d 39, 44 (Fla. 1994)(same); *Colina v. State,* 634 So. 2d 1077, 1082 (Fla. 1994)(same); *Coleman v.*

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[25] The decision to prosecute or not, or to grant immunity is wholly within the discretion of the State Attorney. Her decisions in such matters are questions of executive prerogative not subject to judicial scrutiny. *State v. Bloom, 497 So.* 2d 2, 3 (Fla. 1986).

State, 610 So. 2d 283, 1287 (Fla. 1992)(same); *Robinson v. State*, 610 So. 2d 1288, 1292 (Fla. 1992)(same); *Downs v. State*, 572 So. 2d 895, 901 (Fla. 1990)(same); *Williamson v. State*, 511 So. 2d 289, 293 (Fla. 1987)(same); *Troedel v. State*, 462 So. 2d 392, 397 (Fla. 1984)(same); *Tafero* v. *State*, 403 So. 2d 355, 362 (Fla. 1981)(same); *Jackson* v. *State*, 366 So. 2d 752, 757 (Fla. 1978)(same). Defendant's sentence should be affirmed.

CONCLUSION

For the foregoing reasons, the judgment and sentence of the trial court should be affirmed.

Respectfully submitted,
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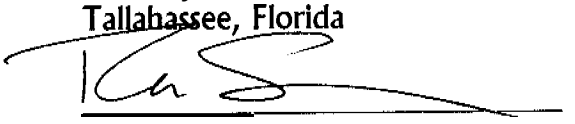

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing BRIEF OF APPELLEE was furnished by U.S. mail to, LEE WEISSENBORN, 235 Northeast 26th Street, Oldhouse, Miami, Florida 33 137, this 25th day of March, 1996.

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